CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 631.

CHARLES PONZI

vs.

FRANKLIN G. FESSENDEN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED DECEMBER 2, 1921.

(28,586)

(28,586)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 631.

CHARLES PONZI

vs.

FRANKLIN G. FESSENDEN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1921.

Original.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1921.

No. 1525.

CHARLES PONZI,
PETITIONER, APPELLANT,
v.
FRANKLIN G. FESSENDEN ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

NOVEMBER 29, 1921.

The facts in this case are as follows: —

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court for Suffolk County in the Commonwealth of Massachusetts charging him with certain larcenies, with being an accessory before the fact to certain larcenies and with conspiracy to commit larceny.

October 1, 1920, two indictments charging violation of Section 215 of the Penal Code were returned against said Ponzi in the District Court of the United States for the District of Massachu-

setts. November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth, in the County of Plymouth and the Commonwealth of Massachusetts.

April 21, 1921, the Superior Court for Suffolk County issued a writ of habeas corpus directing the master of the House of Correction, who, as Federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the twenty-two indictments pending before it but to hold Ponzi at all times in his custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

After service of this writ upon Blake the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the Superior Court and that the Attorney General directed Blake to comply with the writ.

Upon Blake's refusal to produce Ponzi the Superior Court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the Superior Court pursuant to the writ of habeas corpus issued by said court.

May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus directed against the justice of the Superior Court who issued the writ in the State proceedings, and against Blake, the master of the House of Correction, alleging in

substance that he was within the exclusive jurisdiction of the United States, and that the State court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a Federal agent, to try him for said alleged crimes. If material, it further appears in the record that Ponzi, having been produced under said State process before the State court, was arraigned and stood mute, and a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offence for which he was indicted being bailable; and that said request was denied. Ponzi's petition for writ of habeas corpus was denied by said District Court on May 24, 1921; and an appeal was taken to this court.

We desire the instruction of the Supreme Court upon the following question: —

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

It is now, to wit, November 29, 1921, ordered, that the foregoing statement of facts, and question of law arising thereon, be certified under the seal of this court and transmitted to the Supreme Court.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Certificate of Certification.

And now, here, the Judges of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of an Order of Court entered on November 29, 1921, in said cause numbered and entitled, No. 1525, Charles Ponzi, Petitioner for Habeas Corpus, Appellant, vs. Franklin G. Fessenden et al., Defendants, Appellees, and that pursuant to said order, the statement of facts and question of law arising thereon, together with the fact that said Circuit Court of Appeals desires the instruction of the Supreme Court of the United States for the proper decision of said question of law, contained in said order, are hereby certified under the seal of said United States Circuit Court of Appeals for transmission to said Supreme Court.

In testimony whereof I hereto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in the First Judicial Circuit, this twenty-ninth day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

Endorsed on cover: File No. 28,586. U. S. Circuit Court Appeals, 1st Circuit. Term No. 631. Charles Ponzi vs. Franklin G. Fessenden et al. (Certificate.) Filed December 2d, 1921. File No. 28,586.

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES PONZI,
PETITIONER, APPELLANT,

v.

FRANKLIN G. FESSENDEN ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

NOVEMBER 29, 1921.

MOTION TO ADVANCE.

And now comes the Commonwealth of Massachusetts and moves that the question certified by the Circuit Court of Appeals for the First Circuit (a copy whereof is hereunto annexed and marked "A") be advanced for speedy hearing.

REASONS FOR THE MOTION.

On September 11, 1920, twenty-two indictments were returned against Charles Ponzi, who was then in Federal custody, charging him with conspiracy to commit larceny, with being an accessory before the fact to certain larcenies, and with certain larcenies. In the indictment for conspiracy six other persons are joined, to wit: Louis R. Cassullo, John S. Dondero, John A. Dondero, Harry Mahoney, Rinaldo Bosselli and Henry T. Nielsen. Of these all except Cassullo have been arrested and are awaiting trial. The date of the alleged conspiracy is laid as April 1, 1920. The alleged larcenies with which said Ponzi is charged either as principal or as an accessory before the fact are alleged to have been committed in April, May, June and July, 1920. Many of the witnesses are persons who do not long remain in one place. A considerable number are aliens who may at any time leave the Commonwealth and the United States. In order that evidence might not be lost by delay the Commonwealth prepared these cases for trial and on April 21, 1921, procured from the Superior Court of Suffolk County a writ directing Earl P. Blake, the Master of the House of Correction at Plymouth, to produce before the said court the said Ponzi for trial forthwith, he to remain at all times in the custody of said Blake as an officer of the United States. Thereafter the proceedings more fully described in the statement of facts accompanying the question certified were had, and Ponzi was produced by said Blake pursuant to said writ. While a jury was being empanelled to try said Ponzi and the other defendants, but before the jury was completed,

said Ponzi sued out the present writ of habeas corpus. The respondent, Judge Fessenden, being of opinion that all the defendants should be tried together, thereupon stayed proceedings not only as to said Ponzi but also as to his co-defendants, to await the conclusion of the present habeas corpus proceeding brought by said Ponzi.

The reasons for advancing this case for speedy hearing may therefore be summarized as follows:

1. Five co-defendants await trial with said Ponzi.

2. The alleged crimes were committed over a year and a half ago.

3. The present indictments have been pending for over a year.

4. The indictments against said Ponzi having been returned at a time when said Ponzi was in Federal custody, the proceedings against him were held in abeyance until the conclusion of the Federal proceedings against him and were thereafter pressed as soon as circumstances would permit.

5. Trial has already been delayed by the present proceedings for over six months.

6. Important, and indeed essential witnesses may die or disappear if the case be left to await its ordinary turn upon the docket.

J. WESTON ALLEN,
Attorney-General.

The above-named Charles Ponzi acknowledges service of a copy of the above motion to be presented on January 3, 1922.

Daniel H. Coakley
by H. Minot Stud
Attorney for Petitioner.

A.

United States Circuit Court of Appeals

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1921.

No. 1525.

CHARLES PONZI,
PETITIONER, APPELLANT,

v.

FRANKLIN G. FESSENDEN ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

NOVEMBER 29, 1921.

The facts in this case are as follows: —

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court for Suffolk County in the Commonwealth of Massa-

chusetts charging him with certain larcenies, with being an accessory before the fact to certain larcenies and with conspiracy to commit larceny.

October 1, 1920, two indictments charging violation of Section 215 of the Penal Code were returned against said Ponzi in the District Court of the United States for the District of Massachusetts. November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth, in the County of Plymouth and the Commonwealth of Massachusetts.

April 21, 1921, the Superior Court for Suffolk County issued a writ of habeas corpus directing the master of the House of Correction, who, as Federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the twenty-two indictments pending before it but to hold Ponzi at all times in his custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

After service of this writ upon Blake the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the Superior Court and that the Attorney General directed Blake to comply with the writ.

Upon Blake's refusal to produce Ponzi the Superior Court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the Superior Court pursuant to the writ of habeas corpus issued by said court.

May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus directed against the justice of the Superior Court who issued the writ in the State proceedings, and against Blake, the master of the House of Correction, alleging in substance that he was within the exclusive jurisdiction of the United States, and that the State court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a Federal agent, to try him for said alleged crimes. If material, it further appears in the record that Ponzi, having been produced under said State process before the State court, was arraigned and stood mute, and a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offence for which he was indicted being bailable; and that said request was denied. Ponzi's petition for writ of habeas corpus was denied by said District Court on May 24, 1921; and an appeal was taken to this court.

We desire the instruction of the Supreme Court upon the following question: —

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on

a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

It is now, to wit, November 29, 1921, ordered, that the foregoing statement of facts, and question of law arising thereon, be certified under the seal of this court and transmitted to the Supreme Court.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Boston, December 24,1921

United States of America,
Massachusetts District, ss

Pursuant hereunto I have this day served the within Motion to Advance on Daniel H. Coakley, Attorney of Record for C harles Ponzi, by giving in hand to W.Minot Hurd, Attorney associated with Daniel H. Coakley, at Pemberton Building, Boston in said District, a true copy of the within Motion to Advance, said Attorney accepting service, by placing his endorsement on this Motion.

William J. Keville,
United States Marshal

By Joseph J. Quinn
Deputy

Supreme Court of the United States.

October Term, 1921.

No. 631.

CHARLES PONZI

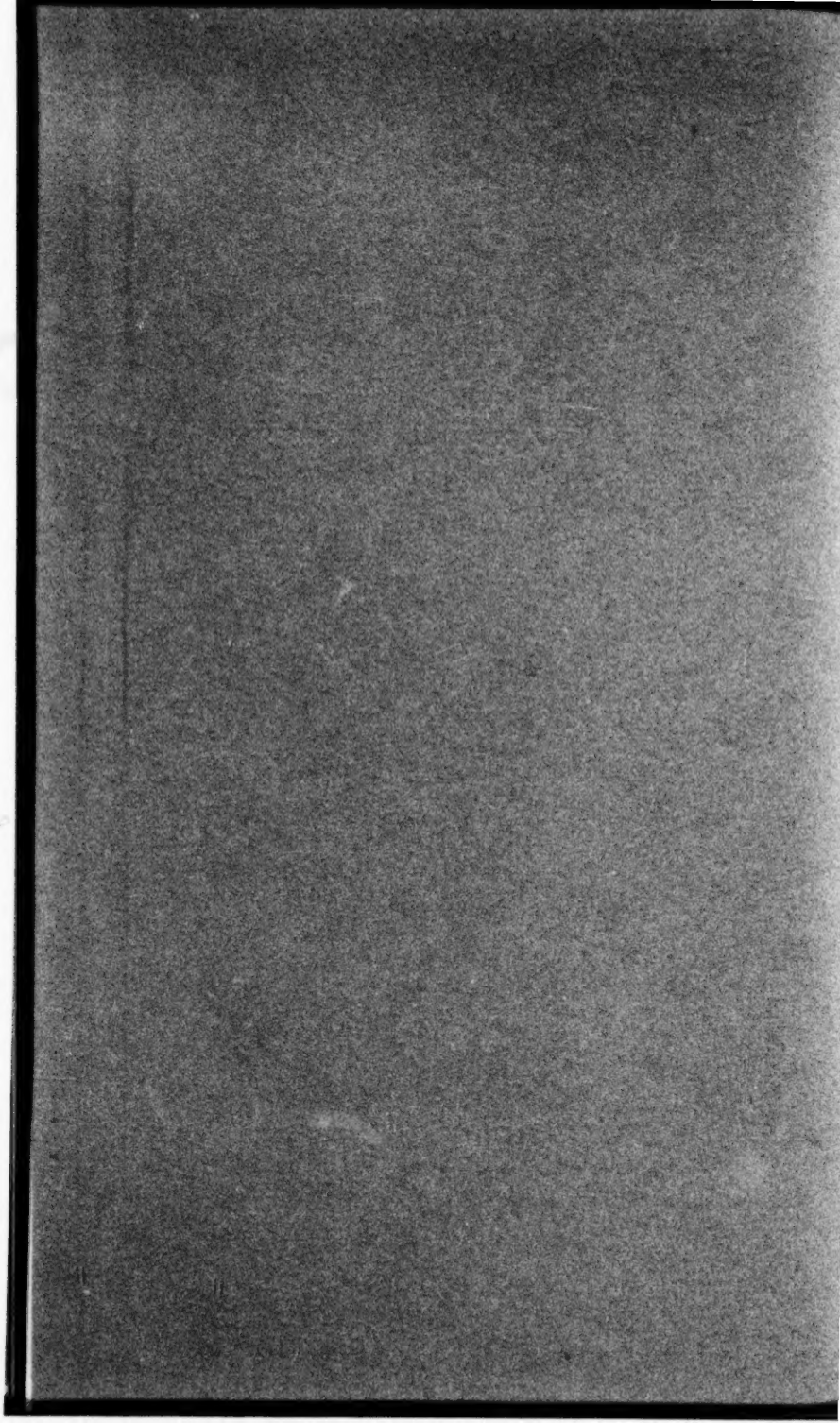
v.

FRANKLIN G. FESSENDEN ET AL.

Brief for Charles Ponzi.

WILLIAM H. LEWIS,
Attorney for Charles Ponzi.

ANDREW C. SPENCELEY & SON, LAW PRINTERS, BOSTON.



INDEX.

CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 631.

CHARLES PONZI

v.

FRANKLIN G. FESSENDEN ET AL.

BRIEF FOR CHARLES PONZI.

This case comes before this court upon a "certificate" of the United States Circuit Court of Appeals for the First Circuit under section 239 of the Judicial Code, in which the Court of Appeals "desires" the instruction of the Supreme Court upon the following question:

"May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?"

STATEMENT OF THE CASE.

Charles Ponzi is a prisoner of the United States, now serving a sentence of five years in the House of

Correction at Plymouth, in the County of Plymouth and Commonwealth of Massachusetts, imposed by the United States District Court for the District of Massachusetts, November 30, 1920, upon a plea of guilty to an indictment charging him with violation of section 215 of the Penal Code—use of the mails in pursuance of a scheme to defraud, or to obtain money or property by false pretenses, etc. A second indictment is still pending against him. September 11, 1920, twenty-two indictments were returned against him in the Superior Court of Massachusetts, sitting at Boston, for the County of Suffolk, charging him with larceny, accessory to certain larcenies, and conspiracy to steal. April 21, 1921, the respondent Fessenden, as he is a Judge of the Superior Court for the Commonwealth of Massachusetts, sitting at Boston, in the County of Suffolk, issued a writ of habeas corpus directed to the other respondent, Blake, as he is Master of the House of Correction at Plymouth, the federal agent having in custody said Ponzi, to bring Ponzi before the said Superior Court forthwith for trial upon said twenty-two indictments then and there pending against him. After the service of this writ upon Blake, an Assistant Attorney General of the United States, by direction of the Attorney General, stated in open court that the United States had no objection to the issuance of the writ, and directed Blake to comply with the same. Blake refused to produce Ponzi, was adjudged in contempt, and was committed to the custody of the Sheriff of Suffolk County. Thereupon Blake filed a petition for the writ of habeas corpus in the United States District Court, directed against the Sheriff, which was heard and dismissed on April 27, 1921.

Thereupon Blake produced Ponzi before the Superior Court for trial. May 23, 1921, Ponzi filed in the District Court of the United States for the District of Massachusetts a petition for the writ of habeas corpus directed against the respondents Fessenden and Blake. His petition was dismissed, an appeal was taken to the Circuit Court of Appeals for the First Circuit, and thereupon all proceedings in the state court were stayed in accordance with R.S. 766.

ARGUMENT, POINTS, AND AUTHORITIES.

The contention of the petitioner Ponzi is that the question certified by the Court of Appeals should be answered in the negative for the following reasons:

I.

IF THE PETITIONER COULD NOT BE TRIED IN THE STATE COURT, PENDING HIS SENTENCE, WITHOUT THE CONSENT OF THE ATTORNEY GENERAL OF THE UNITED STATES, HE COULD NOT BE TRIED AT ALL.

The assent of the Attorney General adds nothing to the legality of such a proceeding. It may be inferred from the statement of facts on page 2 of the certificate, and the form of the question itself on page 3, that it was conceded by the respondent Fessenden that he could not try Ponzi without the consent of the United States. The decision of Morton, J., upon Blake's petition turned upon the assent of the Attorney General to the writ of the state court. The Attorney General of the United States is a statutory officer, and has no power or authority over prisoners of the United States, except such as is expressly given

him by some statute of the United States, or as may be necessarily implied from some express statute.

It is submitted that the Attorney General has no such custody or control over a prisoner of the United States while serving a sentence in a state jail or penitentiary as will give him the power to direct a federal agent to hand such a prisoner over to a state court for trial.

The Attorney General has power to make contracts for the subsistence and employment of prisoners of the United States serving sentence in state jails or penitentiaries. R.S. sec. 5547.

Prisoners of the United States confined in a state jail or penitentiary cannot receive a deduction from their term of sentence, or discharge, without the approval of the Attorney General. R.S. 5543.

No prisoner may be paroled from a state jail or penitentiary without the approval of the Attorney General. Sec. 10,543 of the Comp. Sts., Act of June 25, 1910, c. 387, sec 9; 36 Sts. at L. 821.

The Attorney General may designate a place of imprisonment where there is no suitable one in the state or district where the prisoner is sentenced, and may change the place of imprisonment for certain reasons with the consent of the prisoner. R.S. 5546 as amended. Sec. 10,547 of the Comp. Sts.

The Attorney General has no control over a prisoner in a state jail or penitentiary. R.S. 5539 is decisive of that question.

> "Whenever any criminal, convicted of any offence against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the

same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

In *Beavers* v. *Henkel*, 194 U.S. at page 83, this court said:

> "We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. . . . In other words, the removal [under 1014 R.S.] is made a *judicial* rather than a mere ministerial act."

Again, in *Logan* v. *United States*, 144 U.S. 295, this court said:

> "The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty, and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense. . . . Persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any state."

It would seem that, from these emphatic and un-

qualified expressions of this court, a prisoner of the United States is not wholly without some protection.

II.

THE ATTORNEY GENERAL HAS NEITHER EXPRESS NOR IMPLIED AUTHORITY TO INTERVENE IN A HABEAS CORPUS CASE OF THIS CHARACTER.

It is significant that, even in cases involving questions of international law, when a writ of habeas corpus is issued in behalf of a prisoner, who is a subject or citizen of a foreign state, and is in custody under the authority of any one of the United States, for an act done for which he claims protection or exemption under the sanction of a foreign state, notice of the proceedings should be served upon the Attorney General of the state, and not upon the Attorney General of the United States. R.S. 762.

III.

IF THE SITUATION WERE REVERSED, AND PONZI HAD BEEN FIRST TRIED IN THE STATE COURT AND SENTENCED TO SERVE A TERM IN A STATE JAIL OR PRISON, AND THE UNITED STATES DESIRED TO TRY HIM UPON INDICTMENTS PENDING AGAINST HIM IN THE UNITED STATES DISTRICT COURT, NEITHER THE COURT, NOR ANY JUDGE THEREOF, COULD ISSUE A WRIT OF HABEAS CORPUS TO BRING HIM INTO THAT COURT FOR TRIAL.

R.S. 753 provides in substance:

> "That a writ of habeas corpus issued by a federal judge or court, shall in no case extend to a prisoner in jail, unless where he is in custody

under or by color of the authority of the United States;—unless it is necessary to bring the prisoner into Court to testify."

In other words, a prisoner serving sentence, pursuant to a judgment of a state court, in a state jail or prison, cannot be brought into a United States court to respond to an indictment found against him, or for any other purpose except to testify.

Ex parte Burrus, 136 U.S. 586.
Re Dorr, 3 How. 103.
Ex parte Bollman, 4 Cranch, 75.

This court said in the Dorr case:

"The power given to the courts, in this section, to issue writs of scire facias, habeas corpus, etc., as regards the writ of habeas corpus, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction; and that they qualify and restrict the preceding provisions of the section is undisputable. Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used

> as a witness; and it is immaterial whether the imprisonment be under civil or criminal process."

It would seem, therefore, that the United States ought not to permit a state court to try a prisoner of the United States where, under the same circumstances, a United States court could not try a state prisoner. There is no comity in it.

In all the judicial history of the Commonwealth, from *Sims's Case* (1851) down to the present, Massachusetts has never attempted to assert the right which is now being asserted in this case.

IV.

THE PROCEEDING OF THE STATE COURT, BRINGING PONZI BEFORE IT FOR TRIAL BY A WRIT OF HABEAS CORPUS, IS PRACTICALLY FORBIDDEN BY THE LAWS OF THE COMMONWEALTH UPON THE SUBJECT OF HABEAS CORPUS.

Chapter 248 of the General Laws of Massachusetts, sec. 34, dealing with the subject of habeas corpus, provides:

> "This chapter shall not authorize the taking of a person by writ of habeas corpus out of the custody of the United States marshal, or his deputy, who holds him by a legal and sufficient process issued by any court or magistrate of competent jurisdiction."

The attempt of the state court to try Ponzi, under the circumstances, is clearly an evasion of the state statute, through the device of having him technically remain in the custody of a federal agent, the Master of the House of Correction. The state statute was

enacted for the same purpose as the United States statute upon the subject, for the purpose of preventing a conflict of jurisdiction between the United States and the state courts. It is a mere fiction to say that Ponzi is not in the custody of the court when set to trial. The state court has taken custody of Blake, the Keeper, a federal agent, and therefore must necessarily have custody of Ponzi, his prisoner.

V.

THE WRIT BY WHICH PONZI IS BROUGHT BEFORE THE STATE COURT FOR TRIAL IS IN EFFECT AN ABUSE OF THE WRIT OF HABEAS CORPUS.

What species of habeas corpus is invoked by the state court to bring Ponzi before it for trial? Different classes of habeas corpus writs are set forth in Blackstone's Commentaries, vol. 3, star page 129. This classification was adopted by this court in *Ex parte Bollman*, 4 Cranch, at 98. Without going into the different species, it may be claimed that this is a habeas corpus *ad prosequendum, testificandum, deliberandum*, etc., "which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed." This writ was used in the English law to bring in prisoners from one court to another in the same jurisdiction. That was the use of the writ in the Bollman case. In that case Bollman and Swartwout were committed by the Circuit Court of the District of Columbia on a charge of treason against the United States, which case came before the Supreme Court upon a petition for the writ of habeas corpus and certiorari. The motion was al-

lowed. The court said, with reference to the writ *ad prosequendum*, etc., that "the power to bring a prisoner up that he may be tried in the proper jurisdiction is understood to be the very question now before the court." It is used here as a substitute for removal, or an extradition proceeding. Obviously this writ could not be used to take a prisoner from one state to another, from one jurisdiction to another jurisdiction. If Ponzi had been confined in Atlanta, or in a state prison in Rhode Island, the writ issued out of the state court of Massachusetts could not reach him to bring him before that court. The jurisdiction of the United States, where Ponzi is, is just as foreign to Massachusetts as Rhode Island is to Georgia, and the writ of that court is powerless to reach across the line between the two jurisdictions, that of the State of Massachusetts and the United States, as if the United States were a foreign country.

VI.

THE MITTIMUS ITSELF FORBIDS INTERFERENCE WITH THE BODY OF PONZI BY THE STATE COURT.

The mittimus is in the usual form: In the name of the President of the United States it commands the Marshal, or his deputies, to deliver into the custody of the Master of the House of Correction the body of Charles Ponzi (reciting that he had been sentenced by the court to be imprisoned in the House of Correction at Plymouth, in the County of Plymouth, for a term of five years from November 30, 1920); and then, in the name of the President of the United States, it commands the Master of the House of Correction to re-

ceive said Charles Ponzi into his custody in his said House of Correction, "and him there safely to keep until this sentence is performed or he is otherwise discharged in due course of law."

It is fundamental that, after the term of the court has expired at which sentence was rendered, the court itself cannot interfere with its own mittimus.

In re Jennings, 118 Fed. 479.
Com. v. *Foster*, 122 Mass. 317.
Goddard v. *Ordway*, 101 U.S. 752.
Basset v. *United States*, 9 Wall. 38.
Ex parte Lange, 18 Wall. 167.

In the Jennings case the court said:

> "The law contemplates that after a prisoner has been tried and sentenced, he will be committed at once to the custody of the prison officials where the sentence is to be executed. He passes by virtue of the sentence into a custody different from that of the court before which he was convicted. This doctrine is enforced so rigidly in some jurisdictions, and possibly in all, that, after a sentence for a crime has been pronounced, the prisoner cannot be arraigned and tried for another offense, even in the same court by which he was sentenced, until the sentence is reversed by a higher tribunal, or he has served out his term of imprisonment."

If the mittimus may be interfered with, or modified to the extent of taking Ponzi into the state court and keeping him there long enough to try him upon twenty-two indictments, what is the limit to which further modification may be made in his sentence?

VII.

IN ALL CASES OF CONCURRENT JURISDICTION OR OTHERWISE, THE COURT THAT FIRST ACQUIRES JURISDICTION HOLDS IT TO THE EXCLUSION OF ALL OTHERS, UNTIL ITS JUDGMENT IS SATISFIED.

McCauley v. *McCauley*, 202 Fed. 280, 284.
State v. *Chinault*, 55 Kan. 326.
Ex parte Earley, 3 Ohio Dec. 105.
Com. v. *Fuller*, 8 Met. 318.
Hill Mfg. Co. v. *Prov. & N.Y. Steamship Co.*, 113 Mass. 495.
Ayer v. *Fowler*, 196 Mass. 350.
Wayman v. *Southard*, 10 Wheat. 1.
Covell v. *Heyman*, 111 U.S. 176.
Taylor v. *Taintor*, 83 U.S. 366.
Felts v. *Murphy*, 201 U.S. 123.
Harkrader v. *Wadley*, 172 U.S. 163.
In re Johnson, 167 U.S. 120.
Opinion of the Justices, 201 Mass. 608.

In *Harkrader* v. *Wadley*, this court said:

> "When a state court and a court of the United States may each take jurisdiction of the matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed, and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

This court also said, in *Taylor* v. *Taintor:*

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal

> which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan* v. *Lucas,* 10 Pet. 400; *Taylor* v. *Carryl,* 20 How. 584, 15 L. ed. 1028; *Troutman's Case,* 4 Zabr. 634; *Ex parte Jenkins,* 2 Am. Law Reg. 144. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

In *Wayman* v. *Southard,* Marshall, C.J., said:

> "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."

The principle in *Taylor* v. *Taintor, ante,* was adopted by the Massachusetts Supreme Court in the *Opinion of the Justices,* 201 Mass. 608. In that case a prisoner was confined in state's prison at Charlestown, Massachusetts, serving a sentence for burglary. The Governor of New York made a requisition upon the Governor of Massachusetts, alleging that the prisoner was a fugitive from justice of the State of New York charged with the crime of murder in the first degree. The question propounded by the Governor and Council to the Justices was as follows:

> "May a person convicted of a crime in this Commonwealth and duly committed to and confined in the state prison or other penal institution, be taken therefrom under and by authority of a

warrant issued by the Governor for the extradition of such person, upon lawful demand by the Executive of another State and in accordance with the Constitution and the laws of the United States?"

The Supreme Court of Massachusetts answered the question unanimously in the negative. The court said that section 2 of article 4 (the rendition clause) of the Federal Constitution, had no application to an offender at the time held to answer to an offense against the laws of the state in which he has taken refuge.

> "The demands of justice in that state are as high as in the state from which he came. So long as he is held to answer to the demands of justice in the state where he is found, the demand of the executive authority of the other state should be subordinate to the operation of the laws of his place of refuge. Not only does this follow from the principles on which the constitutional provision rests, but it is stated in decisions of different courts" (citing *Taylor* v. *Taintor*).

Speaking of the power of the Governor:

> "He has no statutory authority to interfere with the execution of the sentence in a criminal case, otherwise than by pardoning the offender. . . . It is within the province of the judicial department to try persons who are charged with crime and to impose punishment upon them if they are found guilty. Except by a pardon of the convict, neither of the other departments can nullify or set aside a sentence of the judicial department

> which is in process of execution under proper warrant from the court. . . . His power, under this provision of the Constitution, is subordinate to the power of his own State, through its proper officers, to hold its prisoners, convicted of crime, until their expiation under its laws has become complete."

If the contention of the respondent is sound, that the rule of comity should govern, why should not the prisoner be taken to New York, tried and convicted of murder in the first degree, and sentenced to be electrocuted to take effect at the expiration of his term of imprisonment in the Massachusetts State penitentiary?

The Johnson case was a petition for the writ of habeas corpus to obtain the release of Charles Johnson from the custody of the Marshal for the Southern District of the Indian Territory, who held him under sentence of death for the crime of rape. The crime was committed in the Indian Territory on the 24th day of July, 1896. The District Court of the United States for the Eastern District of Texas had jurisdiction of the offense. On the 25th day of July a warrant was issued by the United States Commissioner for the Eastern District of Texas against the defendant, charging him with the commission of the crime, but was not served. By Act of March 1, 1895, an additional court was created in the Indian Territory, to be established on the 1st of September, 1896, and provided that in all criminal cases where the courts outside of the Indian Territory had acquired jurisdiction prior to September 1, 1896, they should retain jurisdiction and finally dispose of such cases. On the 17th day of

October, 1896, the defendant was tried, convicted, and sentenced to death by the United States court for the Indian Territory. The petitioner claimed that the United States court for the Indian Territory had no jurisdiction over him, the crime having been committed before September 1, 1896, and claimed that the United States District Court of Texas alone had jurisdiction. His petition for the writ of habeas corpus to be discharged from the custody of the Marshal of the United States court for the Indian Territory was denied. In the course of the opinion, Mr. Justice Brown said:

> "We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State courts should not determine this question. Ever since the case of *Ableman* v. *Booth*, 62 U.S., 21 How. 506, it has been the settled doctrine of this court, that a court having possession of a person or property, cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession."

Could any language be stronger and more conclusive than this? Does not the principle laid down there apply to the case at bar with telling force and effect? The jurisdiction of the United States District Court for the District of Massachusetts is not exhausted until the sentence is performed in accordance with its mittimus, or the prisoner is discharged by operation of law—parole or pardon. Moreover, an indictment is still pending against Ponzi in the United States District Court for the District of Massachusetts.

VIII.

CAN THE STATE COURT TRY PONZI WITHOUT JURISDICTION OVER HIS PERSON; IN OTHER WORDS, WITHOUT CUSTODY OF THE PRISONER?

Cyc. vol. 12, pp. 196, 220.
16 Corpus Juris, 174.
12 Ency. Pl. & Pr. p. 179.
Bissell v. *Briggs*, 9 Mass. 467.
Hopkins v. *Com.*, 5 Met. 462.
McCarthy v. *State*, 16 Ind. 311.
Logan v. *Liggarson*, 12 Blackf. (Ind.) 267.
People v. *Hayes*, 136 N.Y. Sup. 857.
Ex parte Bigelow, 113 U.S. 328.
Felts v. *Murphy*, 201 U.S. at p. 123.
In re Johnson, 167 U.S. 120.
Eckhart, Petn'r, 166 U.S. 484.
Carter v. *McClaughry*, 183 U.S. 388.
Valentina v. *Mercer*, 201 U.S. 131.

This court said, in *Ex parte Bigelow:*

> "But that Court had jurisdiction of the offence described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him."

The same language is quoted with approval in *Eckhart, Petn'r;* and also in *Valentina* v. *Mercer.*

In *In re Johnson* this court said (167 U.S. 125):

> "In this connection, jurisdiction of the 'case', i. e. the crime is indistinguishable from jurisdiction of the person who is charged with the crime."

It is admitted that the Superior Court of Massachusetts, being without the custody of the prisoner, would have no present power or authority to enforce any order or judgment against him. If the prisoner should be in contempt of court, the court would have no power to commit him. If the prisoner should commit a crime in the presence of the court, the court would have no authority to punish him.

The certificate shows that, under the habeas issued out of the state court, Ponzi was at all times to remain in the custody of the Master of the House of Correction, the other respondent, Blake, as an officer of the United States.

IX.

CHARLES PONZI, AS A PRISONER OF THE UNITED STATES, IS "WITHIN THE DOMINION AND EXCLUSIVE JURISDICTION OF THE UNITED STATES"—"THE PRISONER IS WITHIN THE DOMINION AND JURISDICTION OF ANOTHER GOVERNMENT, AND NEITHER THE WRIT OF HABEAS CORPUS, NOR ANY OTHER PROCESS ISSUED UNDER STATE AUTHORITY, CAN PASS OVER THE LINE OF DIVISION BETWEEN THE TWO SOVEREIGNTIES."

Ableman v. *Booth*, 21 How. 506.
Robb v. *Connolly*, 111 U.S. 624.
In re Johnson, 167 U.S. 120.
Logan v. *United States*, 144 U.S. 263.
Willoughby on the Constitution of the United States, c. 9, sec. 72.

Bailey on Habeas Corpus, p. 68.

Opinions of Attorneys General, vol. 6, *Collier's Case*, opinion by Caleb Cushing, p. 103.

Opinions of Attorneys General, vol. 12, opinion by Henry Stanbury, *Gormley's Case*, p. 258.

The language of this proposition is taken from *Ableman* v. *Booth*, 21 How. 506. This is a case where one Booth was charged before the United States Commissioner for the District of Wisconsin with having aided and abetted the escape of a fugitive slave. Upon examination before the Commissioner, probable cause was found to hold Booth for the Grand Jury. Booth was surrendered by his bail, and the Commissioner committed him to the custody of the Marshal to be delivered to the Keeper of the jail "until he should be discharged by due course of law." Booth brought a petition for the writ of habeas corpus before a Single Justice of the Supreme Court of Wisconsin against Ableman, Marshal of the United States, alleging that his imprisonment was illegal. The case finally came before this court. The opinion was rendered by Chief Justice Taney:

> "We do not question the authority of a state court, or judge, who is authorized by the laws of the state to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has

a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the Marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the state judge or court, judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other proceeding issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the Marshal, or other person holding him, to make known, by a proper return, the au-

thority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon the habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the Marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

The doctrine laid down in *Ableman* v. *Booth* has never been questioned. This case was decided in 1859. The same result was arrived at by Caleb Cushing, the Attorney General of the United States, in 1851, *Collier's Case*, vol. 6, p. 103. Attorney General Caleb Cushing said, among other things:

> "*A fortiori,* if the indictment be found in a competent court of the United States, the prisoner cannot be withdrawn from its jurisdiction by habeas corpus returnable before a court of one of the States."

Upon principle it seems to us that the doctrine in the Booth case should apply, for the reason that Ponzi is in another jurisdiction. The sovereignties of the State of Massachusetts and the United States are separate and distinct, as if they were foreign states. A prisoner cannot be extradited from one state to another without his consent unless certain procedure is gone through. A prisoner cannot be removed from one federal jurisdiction to another unless certain forms of law are complied with; that is to say, without his consent. It will not be denied that, if Ponzi were in the United States prison at Fort Leavenworth, or at Atlanta, the writ of the state court would not reach him, and he could not be placed upon trial until he had served his term or been discharged by operation of law. Why should there be any difference upon principle in the power of the state court to try him, simply because he happens to be serving his sentence in the State of Massachusetts? Being in the custody of the United States, in the House of Correction at Plymouth, he is just as much in a foreign jurisdiction, foreign to the State of Massachusetts, as if he were in Atlanta, Georgia.

It may be contended that the doctrine in *Ableman* v. *Booth* applies only to the high prerogative writ, in which it is sought to discharge a prisoner held by the United States. But the doctrine laid down has never,

so far as I have been able to ascertain, been so limited. The language is certainly broad enough to cover a case of this kind. Note particularly this language of the Chief Justice in the Booth case: "*But, after the return is made, and the state judge or court, judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.*" There is no question that the appellant, Charles Ponzi, is in the custody under the authority of the United States under the mittimus issued out of the District Court of the United States for the District of Massachusetts November 30, 1920.

The writ issued out of the state court is *pro tanto*, at least, a habeas *ad subjiciendum*, for it takes a federal prisoner, and a federal agent, out of the federal prison, brings them into the state court, and holds them there under the pains and penalties of contempt, and imprisonment of the federal agent, for an indefinite period.

The practice suggested in the case of *Ableman* v. *Booth* was followed in a recent case of *Com.* v. *Horwitz*, No. 727, 1915, Suffolk Superior Court, Criminal Session.

In December, 1914, while one Morris Horwitz was a prisoner in the East Cambridge jail, under the custody of the United States Marshal for this District, awaiting action of the federal Grand Jury upon a charge of perjury, a writ of habeas corpus, dated December 19th and returnable December 21st, was issued by the Superior Court for Suffolk County to the Marshal ordering him to produce the prisoner for trial here, upon a complaint charging him with a violation of R.L. c.

165, sec. 45. The writ was presented to the Marshal, who, through the deputy, made to the Chief Justice of said Superior Court the following return:

"DECEMBER 19, 1914.

"Pursuant hereto I have the honor to make the return that the body of the within-named Morris Horwitz is now in my lawful custody as United States Marshal for the District of Massachusetts under the Constitution and laws of the United States, and respectfully invite the Honorable Court's attention to the decision of the Supreme Court of the United States in the case of *Ableman* v. *Booth*, 62 U.S. p. 506."

There was argument before the Chief Justice in which the District Attorney for Suffolk County, or one of his assistants, urged that the mandate of the writ should be enforced. The return was, however, accepted by the Chief Justice as sufficient, and the writ was never served.

X.

UPON THE PRINCIPLES OF NATURAL JUSTICE, THE STATE COURT SHOULD NOT BE PERMITTED TO TRY PONZI UNDER THE CIRCUMSTANCES, BECAUSE HE WOULD BE SUBJECT TO DOUBLE PUNISHMENT FOR THE SAME ACTS.

While technically there is no legal objection to trying a man for the same criminal acts by both the state courts and the United States courts, if the acts are punishable by both jurisdictions; yet it has been the invariable practice that, where a man is punished by one court, the other court will go no further.

In *Com.* v. *Fuller*, 8 Met. 316, there was a prosecution and conviction for having in his possession counterfeit coin, with intent to pass the same. Objection was made to the jurisdiction of the court by the prisoner, on the ground that the offense was one indictable and cognizable only in the courts of the United States, and he was liable to be indicted and tried in the courts of the United States. The Supreme Court of Massachusetts said:

> "It is contended also, that it is unconstitutional to subject a person to the operation of two distinct laws upon the same subject, and inflicting different pains and penalties. But I hold that the delinquent cannot be tried and punished twice for the same offence, and that the supposed repugnancy between the several laws does not, in fact, injuriously affect any individual. The man who commits the crime runs the hazard, under which jurisdiction he may be subjected to punishment; and after violating the law, it comes with ill grace from him to complain of the penalty. If he were indeed liable to be punished twice for the same offence, he might well argue against oppression; and the existence of such liability would go far to prove the unconstitutionality of the law. But while the proviso in the act of congress remains unrepealed, the criminal cannot be thus exposed; as the court which first exercises jurisdiction has the right to enforce it by trial and judgment, by the well established principles of law relating to the jurisdiction of courts. See 5 Wheat. 1 [*Houston* v. *Moore*]."

The argument in favor of this proposition is best set forth by Mr. Justice McLean in *Moore* v. *The People of the State of Illinois*, 14 How. at 21, a dissenting opinion:

> "It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and an adequate punishment has been provided by it for an offense, no state, it appears to me, can punish the same act. . . .
>
> "It is true, the criminal laws of the federal and state governments emanate from different sovereignties, but they operate upon the same people, and should have the same end in view. In this respect, the federal government, though sovereign within the limitation of its powers, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.
>
> "It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the state laws, as under the laws of the federal government. It is true he lives under the aegis of both laws; and though he might yield to the

power, he would not be satisfied with the logic or justice of the argument."

XI.

QUERY: IS IT THE "DUE PROCESS OF LAW" TO WHICH THE PETITIONER IS ENTITLED UNDER SECTION 1 OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO BE SET TO TRIAL IN A STATE COURT WHILE SERVING SENTENCE AS A FEDERAL PRISONER?

Due process of law is a legal conception difficult to express. Due process is the current process. Whatever procedure the states may establish with regard to criminal trials seems to be due process.

This court said, in *Twining* v. *New Jersey*, 211 U.S. 103:

> "This court has never attempted to define with precision the words 'due process of law'. . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the union may disregard."

In *Frank* v. *Mangum*, 237 U.S. 348, Mr. Justice Holmes in the dissenting opinion said:

> "If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for, in our opinion, it is nothing more, *U. S.* v. *Sing Tuck*, 194 U.S. 161, 168, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621) that calls for a resort to the local appellate tribunal before coming to the

courts of the United States for a writ of habeas corpus, when, as here, that resort has been had in vain, the power to secure fundamental rights that had existed at every stage becomes a duty, and must be put forth."

Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction.

Pennoyer v. *Neff*, 95 U.S. 714, 733.
Scott v. *McNeal*, 154 U.S. 34.
Old Wayne Life Ins. Association v. *McDonough*, 204 U.S. 8.

This court said, in *Scott* v. *McNeal:*

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities [citing numerous authorities]. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

The contention is that the court, being without custody of Ponzi's body, cannot try him in a criminal case.

The Constitution of Massachusetts, art. XXVI, provides:

"No magistrate or court of law shall demand

excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishment."

General Laws of Massachusetts, c. 276, sec. 42, provides:

> "If it appears that the crime has been committed . . . the court or justice shall . . . admit the prisoner to bail, if the crime is bailable, and sufficient bail is offered."

It will not be doubted that larceny is a bailable offense, all crimes being bailable except the crime of treason, Gen. Laws of Mass. c. 264, sec. 1. In this case Ponzi is set to trial in the state court upon a bailable offense, and is denied bail.

Certainly there can be no doubt that one of "the fundamental" rights is the right to "a fair and impartial trial." Under the circumstances of this case Ponzi could not receive a fair and impartial trial. His case is prejudged before he is set to trial. He is under sentence in the United States Court for the same acts for which he would be tried in the state court. He is brought into court; he is not arrested, or served with any process; a plea is entered for him; he is held without bail, tried by a court without jurisdiction, and subjected to cumulative sentences, which may amount in fact to cruel and unusual punishment.

The Respondents' Case.

The precise question raised here has never been passed upon by the Supreme Court of the United States. An attempt was made to raise the question in

the case of *Ex parte Lamar* by a petitioner for certiorari to this court, which was denied, 250 U.S. 673.

Lamar was tried and convicted, and sentenced in the United States District Court for the Southern District of New York to two years in the United States penitentiary at Atlanta for impersonating an officer of the United States. Before being sentenced to Atlanta he committed another crime in that district, and was indicted with others for conspiracy in restraint of foreign commerce. While serving sentence at Atlanta, he was brought to New York without removal proceedings having been instituted under R.S. 1014, by direction of the Attorney General of the United States, and as soon as he arrived in New York he was brought before the District Court by writ of habeas corpus for trial, which resulted in his conviction, and was sentenced to one year in prison. He protested against the second trial, on the ground that he had a right to serve out his first term of imprisonment without interruption; and alleged also that he was forcibly removed from prison and taken to New York. Lamar later brought a petition for the writ of habeas corpus before Circuit Judge Manton in the Second Circuit. The case is reported in 274 Fed. 160, raising among other things the question as to whether he could be tried for the second offense while serving sentence for the first. The writ was denied upon the authority of the kidnapping cases, so-called:

Mahon v. *Justice*, 127 U.S. 700;
Kerr v. *Illinois*, 119 U.S. 436;
Pettibone v. *Nichols*, 203 U.S. 192.

These cases rest upon the doctrine as stated in *In re Johnson*, 167 U.S. 120, to wit:

> "That the law will not permit a person to be kidnapped or decoyed without the jurisdiction for the purpose of being compelled to answer to a mere private claim. But in a criminal case, the interests of the public override that which is after all a mere privilege from arrest."

The Lamar case may be distinguished from the case at bar, first, on the ground that there was a question of jurisdiction between two courts of the United States, not a question between the jurisdiction of a state court and a United States court; second, the United States court which tried Lamar for the second offense had custody of the person, although the court got jurisdiction by an unwarranted act of the Attorney General's, and practically by kidnapping the prisoner. Had Lamar been given an opportunity to bring a petition for the writ of habeas corpus in the United States District Court at Atlanta before he was kidnapped, there is little doubt that, on the authority of *In re Johnson*, his removal to New York for a second trial would not have been permitted.

Whatever authority the Attorney General may have over prisoners serving sentences in federal prisons under Comp. Sts. sec. 10,555, Act of March 3, 1891, c. 524, sec. 4, he has no such control over federal prisoners serving sentences in a state jail, as they are under the exclusive authority of the Keeper of the jail, or Master of the House of Correction, or Warden.

The only way by which the Ponzi case could be brought within the Lamar case, the Kerr case, the

Pettibone case, and the Mahon case would be to have the respondent Fessenden send the court officers down to the House of Correction at Plymouth, and forcibly take Ponzi and bring him up before the state court and proceed to try him. If he could be kept there long enough to finish his trial and be sentenced before the United States Marshal and his forces could retake the prisoner, probably the court could try Ponzi and render a valid judgment and sentence in his case.

The class of cases relied upon by the respondents is where the prisoner, while serving a sentence in a state penitentiary, commits some crime, generally homicide. He may be tried and executed notwithstanding his sentence. These cases, of course, are not in point, for the reason that the prisoner is at all times within the same jurisdiction, and, whether in prison or out of prison, he is subject to the criminal laws of the jurisdiction.

The principal case relied upon by the respondent is that of *Rigor* v. *State*, 101 Md. 465. In this case the plaintiff was convicted of a felony by the Circuit Court of Baltimore County in the State of Maryland, for which he was sentenced to be confined in state's prison for five years, and was committed to the custody of the Warden. Before receiving this sentence it appears that he had been indicted by a Grand Jury for Baltimore City for assault with intent to kill and murder. After his sentence he was brought in for trial by writ of habeas corpus before the criminal court of Baltimore City. He objected to his trial on the ground that he was then serving a sentence, and moved to quash the writ of habeas corpus. The motion was overruled, he was tried and adjudged guilty, and sentenced to

serve for a term of nine years, to begin at the expiration of the five years which he was already serving. The court held that, after final judgment and conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it, and cites *Mahon* v. *Justice*.

The Supreme Court of Maryland came to exactly the opposite conclusion in the case of *State* v. *Boyle*, 25 Md. 509, in which it appeared that one Boyle was indicted in Anne Arundel County for murder and larceny. The charge of murder was transferred to Howard County for trial. Upon the other indictment he was tried in Anne Arundel County, convicted, and sentenced to the penitentiary. After he had begun service of his sentence, the Circuit Court for Howard County issued a writ of habeas corpus to bring the prisoner from the penitentiary to try him for murder. He was produced by the Warden, who showed a copy of the judgment by virtue of which he held the prisoner in custody. The State Attorney moved that the custody of Boyle be transferred and he be handed over to the Sheriff of Howard County in order that he might be tried for the indictment of murder. Boyle's counsel moved to quash the writ of habeas corpus. The court overruled the State's motion, sustained that of the prisoner, and remanded Boyle to the custody of the Warden. The Supreme Court held that no writ of error would lie to a judgment of the Circuit Court upon a petition for the writ of habeas corpus. The reasoning in the Rigor case does not apply to this case, and should have little force or effect, since the prisoner has been punished once for the acts complained of.

What a state court may do with a state prisoner is one question; what a state court may do with a federal prisoner is quite a different question.

The Blake decision, by Morton, J., in the United State District Court (decision not published), does not help us. Ponzi was not a party, and the points and authorities raised in his behalf before this court, and in the Circuit Court of Appeals, were not brought to the attention of Judge Morton. The decision there turned largely upon the assumed authority of the Attorney General. The court there said:

> "Whether against objection made on behalf of the United State the State Court could have issued it, it is not necessary to decide."

In re Andrew, 236 Fed. 300, is another case relied upon by the respondents. This was a case where an alien, who was ordered deported, was also wanted as a witness in the state court. Upon an order of the department she was turned over to the local authorities, and was ordered held under bond of $300, which she could not give. She then brought a petition for the writ on the ground she was entitled to be deported. It would be observed at a glance that that is not the case at bar. The court said in that case: "Either may surrender its custody of a prisoner to the other without the prisoner's consent." That is not this case. Custody has not been surrendered. It is not law as well.

XII.

THE PRINCIPLE CONTENDED FOR BY THE RESPONDENTS IS A DANGEROUS ONE, IN THAT IT WILL LEAD TO CONFUSION, FREQUENT CLASHES, AND CONFLICTS OF JURISDICTION, WHERE NOW NONE EXISTS.

If the Attorney General may turn over a federal prisoner serving sentence in the House of Correction at Plymouth in the State of Massachusetts to a Massachusetts state court for trial, why may he not turn the same prisoner over to a state court in Rhode Island for trial, or a federal court in New York for trial? And if the prisoner were wanted in a dozen different states, he could turn him over to one after the other for trial. Such procedure would violate all laws with regard to extradition and removals.

XIII.

The practice has always been, if a federal prisoner is serving time in one jurisdiction and he is wanted in another, the jurisdiction which wants him lodges with the Keeper of the prison a warrant, and, when the prisoner is discharged at the end of his sentence, or by pardon or other operation of the law, the jurisdiction which wants the prisoner is notified, the prisoner is held, and removal proceedings are instituted. The same thing is true when a federal prisoner is wanted by a state court. The state court lodges its warrant with the Keeper of the prison where the federal prisoner is confined, and is notified when the prisoner's time is up, and upon the prisoner's release he is rearrested upon the state warrant, if he is within the jurisdiction of the state wanting him.

The usual practice in the state court is to allow a prisoner to serve one sentence, and, if he is wanted by another court in the same jurisdiction, he is rearrested upon the expiration of his sentence and taken before the court having jurisdiction of the crime for which he is wanted, and then and there tried.

One thing at a time is a very good rule. It is the rule of law and of order. Anything else is a rule of confusion and chaos, of conflict and strife. The argument of convenience and necessity, that justice may be defeated by delays, is absolutely without force in a case where a prisoner has been punished once for the same crime for which he is wanted; and, besides, you can do but so much to human life, you can take the whole of it, or you can cut it up in segments by taking away the liberty of the individual for a given period. The object of the law is not revenge, but punishment as a protection to society, and as a means of reform of the individual.

SUMMARY.

The Attorney General of the United States has no power or authority, directly or as representing the Executive, to interfere with the sentence of a federal court in a criminal case—either to lend or to hand over a federal prisoner to a state court for trial.

Considerations of comity do not require the United States to turn over a federal prisoner to a state court for trial, while its own laws do not permit it to take from a state jail or penitentiary a state prisoner for trial in its own courts.

Trial in a state court that is without jurisdiction of the person of the prisoner, where the prisoner is held

without bail upon a simple charge of larceny, is not "due process of law."

Ponzi, as a federal prisoner, is "in the law" of the United States, and cannot be surrendered to another jurisdiction until its justice is satisfied.

Respectfully submitted,

WILLIAM H. LEWIS.

No. 681

Supreme Court of the United States

OCTOBER TERM, 1921

CHARLES PONZI, PETITIONER, Appellant

v.

FRANKLIN G. FESSENDEN et al., DEFENDANTS, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

---

Before BINGHAM, JOHNSON *and* ANDERSON, *J. J.*

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR THE APPELLEE FRANKLIN G. FESSENDEN

Supreme Court of the United States

OCTOBER TERM, 1921

CHARLES PONZI, PETITIONER, Appellant

v.

FRANKLIN G. FESSENDEN et al., DEFENDANTS, Appellees

Appeal from the District Court of the United States
for the District of Massachusetts

Before BINGHAM, JOHNSON and ANDERSON, J. J.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR THE APPELLEE FRANKLIN G. FESSENDEN

TABLE OF CONTENTS.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES PONZI, PETITIONER, *Appellant*,

v.

FRANKLIN G. FESSENDEN ET AL, DEFENDANTS, *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, J.J.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR THE APPELLEE FRANKLIN G. FESSENDEN.

STATEMENT OF FACTS.

The facts in this case are as follows:

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court

for Suffolk County in the Commonwealth of Massachusetts, charging him with certain larcenies, with being an accessory before the fact to certain larcenies, and with conspiracy to commit larceny.

October 1, 1920, two indictments charging violation of section 215 of the Penal Code were returned against said Ponzi in the District Court of the United States for the District of Massachusetts November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth in the County of Plymouth and the Commonwealth of Massachusetts.

April 21, 1921, the Superior Court for Suffolk County issued a writ of habeas corpus directing the master of the House of Correction, who, as Federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the twenty-two indictments pending before it but to hold Ponzi at all times in his custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

After service of this writ upon Blake, the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the

Superior Court, and that the Attorney General directed Blake to comply with the writ.

Upon Blake's refusal to produce Ponzi the Superior Court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the Superior Court pursuant to the writ of habeas corpus issued by said court.

May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus directed against the justice of the Superior Court who issued the writ in the State proceedings, and against Blake, the master of the House of Correction, alleging, in substance, that he was within the exclusive jurisdiction of the United States, and that the State court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a Federal agent, to try him for said alleged crimes. If material, it further appears in the record that Ponzi, having been produced under said State process before the State court, was arraigned and stood mute, and a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offense for which he was indicted being bailable; and that said request was denied. Ponzi's petition for a writ of habeas corpus was denied by said District Court on May 24, 1921; and an appeal was taken to this court (the Circuit Court of Appeals). That court has certified the following question:

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the

United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

ARGUMENT.

A. *The Petitioner must Establish Clearly either that the Law creating the Offense is Unconstitutional or that the State Court lacks Jurisdiction.*

A petition for a writ of *habeas corpus* will not be granted by a Federal court to restrain trial by a state court of a person charged with crime, unless the petitioner demonstrates with the utmost clearness either that the law creating the offense is in conflict with the Constitution of the United States or that the state court lacks jurisdiction.

Frank *v.* Mangum, 237 U. S. 309, 325, 327.
Ex parte Royall, 117 U. S. 241, 250.

B. *The Laws creating the Offenses with which Ponzi is charged are not Unconstitutional.*

We may lay upon one side any contention that the petition is being prosecuted under an unconstitutional law. The indictment for conspiracy rests upon the common law as continued in force by Mass. Const., c. VI, art. VI.

Commonwealth *v.* Ward, 1 Mass. 473.
Commonwealth *v.* Judd, 2 Mass. 329.
Commonwealth *v.* Hunt, 4 Met. 111, 121, per Shaw, C.J.

The indictments for larceny rest upon R. L., c. 208, § 26, which has been upheld against constitutional attack.

Commonwealth *v.* McDonald, 187 Mass. 581, 585.
Commonwealth *v.* Farmer, 218 Mass. 507, 509.

The indictments charging Ponzi with being accessory before the fact rest upon R. L., c. 215, §§ 2 and 3, which have been upon the statute books since 1830 and have frequently been enforced without question.

Commonwealth *v.* Smith, 11 Allen, 243.
Commonwealth *v.* White, 123 Mass. 430, 434.
Commonwealth *v.* Asherowski, 196 Mass. 342.
Commonwealth *v.* Derry, 221 Mass. 45, 47.

The jurisdiction of Massachusetts to punish these crimes is neither limited nor impaired because Ponzi may, in connection with these or other offenses, have committed an additional offense against the United States by using its mails in connection with a scheme to defraud.

Fox *v.* Ohio, 5 How. 410.
United States *v.* Marigold, 9 How. 560, 569.
Moore *v.* Illinois, 14 How. 13, 19.
Ex parte Siebold, 100 U. S. 371, 390.
Cross *v.* North Carolina, 132 U. S. 131.
Crossley *v.* California, 168 U. S. 640, 641.
Gilbert *v.* Minnesota, 254 U. S. 325, 330.
Commonwealth *v.* Walker, 108 Mass. 309.
Commonwealth *v.* Barry, 116 Mass. 1.

Even a conviction for the Federal offense is no bar to prosecution for the State offense.

Moore *v.* Illinois, 14 How. 13, 19–20.
Cross *v.* North Carolina, 132 U. S. 131, 139.

There is no defect in the laws under which Ponzi is to be tried.

C. *To try One already Serving a Sentence for Crime involves no Want of Due Process.*

Imprisonment for crime confers no immunity from trial for other offenses. The trial is conducted in the same manner whether the accused is out on bail, is held under arrest or is produced upon proper process by the warden of a prison or master of a house of correction. Due process is not affected by the mode in which the accused is brought before the court.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
Pettibone *v.* Nichols, 203 U. S. 192.
Ex parte Lamar, 274 Fed. 160.

It is true that, if the accused is serving a sentence, he cannot be admitted to bail even though the offense for which he is now tried would otherwise be bailable. But this disability flows from his previous conviction and is in no sense connected with or incident to his present trial. A prison is not an asylum which protects the accused from trial for crimes other than that for which he is presently serving sentence.

Ex parte Lamar, 274 Fed. 160.
In re Blake, D. C. Mass., April 27, 1921, Appendix A.

Rigor *v.* State, 101 Md. 465.
State *v.* Wilson, 38 Conn. 126.
Thomas *v.* People, 67 N. Y. 218 (Ct. of Appeals, Sickels, 22).
Peri *v.* People, 65 Ill. 17.
Commonwealth *v.* Ramunno, 219 Pa. State 204.
Kennedy *v.* Howard, 74 Ind. 87.
People *v.* Majors, 65 Cal. 138.
Singleton *v.* State, 71 Miss. 782.
People *v.* Flynn, 7 Utah, 378.
Huffaker *v.* Commonwealth, 124 Ky. 115.
Clifford *v.* Dryden, 31 Wash. 545.
Ex parte Ryan, 10 Nev. 261.
Coleman *v.* State, 35 Tex. Cr. App. 404.
Brown *v.* State, 50 Tex. Cr. App. 114.
Simpson *v.* State, 56 Ark. 8.
State *v.* Keefe, 17 Wyo. 227, 252.
13 C.J. 1919, §§ 13, 14.
9 Cyc. 875, 876.
7 Am. & Eng. Encyc., 2d ed. 497.

As was said by Morton, J., in dismissing Sheriff Blake's petition for a writ of habeas corpus (*In re* Blake, D. C. Mass., April 27, 1921):

"So far as Ponzi himself is concerned none of his constitutional rights are being violated by the proceedings against him in the State court. He has no right to make his Federal sentence an asylum from prosecution there."

In *Ex parte* Lamar, 274 Fed. 160, the court said, at p. 171:

"There is no logical reason why a criminal, deprived of his liberty, should not be placed on trial a second time. His op-

portunity of offering defense to the second charge while serving a term for the first offense is as good as if he were committed without bail to imprisonment. The fact that he is serving his term on a conviction is no greater handicap to his defense than the opportunity which is offered in many, if not all, jurisdictions of proving his former conviction. He may have counsel and opportunity to secure his witnesses to offer proof as to his defense, although perhaps handicapped by his incarceration. To hold otherwise would invoke a rule of law which would frustrate the administration of justice, as, for example, where a prisoner while in jail, commits a homicide or breaks jail. If, upon apprehension in either case, he may not be tried for the offense thus committed until he has served possibly a long term for the first offense, witnesses may die and the administration of justice would be defeated. I think that the court could try the petitioner and that it had jurisdiction so to do."

So also in Rigor *v.* State, 101 Md. 465, 471, the court in holding that a prisoner confined in the penitentiary could be produced upon a writ of *habeas corpus ad prosequendum* for trial upon another charge, said:

"It is contended that a writ of *habeas corpus* cannot be used to bring a convict from the penitentiary into the Criminal Court for trial upon an indictment there pending against him, while he is serving a sentence of imprisonment under a conviction of felony entered against him in another Court of the State; and the error complained of is that the Criminal Court refused to quash the writ of *habeas corpus*. Assuming, for the moment, that this Court has authority to review the ruling thus made, there can be no doubt as to the correctness of the Court's action. A writ of *habeas corpus* will bring a convict from the penitentiary into Court, not for the purpose of having the cause of his detention inquired into, but either because he may be needed as a witness, or *because a pending indictment*

against him ought to be heard and determined. The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt. Why should there be a delay in bringing to trial, on an indictment pending against him, a convict who has not yet completed the service of a previous sentence: No reason can be suggested for such a delay in the case of a convict adjudged guilty of some other offense and actually in execution of a sentence thereunder, that does not apply equally to an individual who has been indicted but has not yet been tried. The situation of the two is identical except for the single circumstance that in the first instance the criminal who has more frequently violated the law has been tried and convicted for some of his offenses, whilst the other has not. It is not the policy of the law to encourage the commission of crime. Delay in administering the criminal law and in inflicting punishment promotes crimes as observation and common experience abundantly demonstrate. And if the Courts should hold that one already convicted and actually incarcerated under sentence, could not be brought before the Court on a writ of *habeas corpus* and tried for some other offense, until the expiration of the first sentence, a temptation to commit a crime for the express purpose of escaping altogether or at least of deferring punishment for a previous one, would be held out to the evil minded and depraved. Suppose, for instance, that a homicide had been committed and the assassin has escaped and that for the time being a suspicion does not point to him but is directed towards another. Suppose that the real criminal returns to the scene of the murder and in the vicinity commits a larceny and is arrested therefor and pleads guilty and is sentenced to confinement for eight or ten years in the penitentiary; and that after beginning to serve out that sentence, evidence is discovered which indicates that he was the murderer. Suppose further he should, when confronted with the evidence inculpating him, confess his guilt, and that he should then be indicted for the crime of murder. Would any Court hesitate

to issue a writ of *habeas corpus* directed to the warden of the penitentiary requiring him to produce the convict so that the latter might be put upon trial for the capital offense? Can it be possible that the Court would be so hopelessly impotent, in such circumstances, as to be unable to do anything until the expiration of the sentence of eight or ten years; by which time the main witnesses might be dead, and the ends of justice might be defeated? And yet, if the contention made in the case at bar is sound, the arm of the criminal law would be paralyzed — not a step could be taken towards prosecuting him so long as the convict remained sheltered within the walls of the penitentiary. That is not the law. The Criminal Court had jurisdiction to bring the plaintiff in error before it under a writ of *habeas corpus* and to place him on trial under the indictment there pending against him. *Re* Wetton, 1 Cromp. & Jarvis, 459. In Regina *v.* Day, 3 F. & F. 526, it was held that the Court will not grant an application for a *habeas corpus* to remove a prisoner from gaol, where he is undergoing sentence, in order to take him before a magistrate in another county, to prefer another charge against him; but will grant a *habeas corpus* to bring him up for trial on a true bill being found against him at the assizes on that charge. State *v.* Wilson, 38 Conn. 126; People *v.* Flynn, 7 Utah, 378; *Ex parte* Ah Men, 77 Cal. 202; 15 Am. & Eng. Ency. L. (2 ed.) 191."

D. *Ponzi was brought before the Superior Court of Suffolk County upon Proper and Appropriate Process.*

R. L., c. 191, § 25, now G. L., c. 248, § 25, provides as follows:

"This chapter shall not affect the power of the supreme judicial court, or of a justice thereof, to issue a writ of habeas corpus at discretion, and thereupon to bail a person for whatever cause he has been committed or restrained or to discharge him as law and justice require, unless he has been committed

by the governor and council, the senate or the house of representatives, in the manner and for the causes mentioned in the constitution; nor affect the power of any court or magistrate to issue a writ of habeas corpus, when necessary to bring before it or him a prisoner for trial in a criminal case pending before it or him; or to bring in a prisoner to be examined as a witness in a suit or proceeding, civil or criminal, pending before it or him, if the personal attendance and examination of the witness is necessary for the attainment of justice."

The writ directing Sheriff Blake to produce Ponzi for trial before the Superior Court was issued under this section. This writ is the process appropriate to secure the presence of a prisoner *for trial*. It is obvious that a warrant cannot issue for the apprehension of a prisoner already confined in prison. The prisoner is in the custody of his jailer pursuant to the mittimus. He should be left in that custody to the end that his sentence may not be in any manner interrupted. Yet it is essential that he be produced in court in order that trial may be had according to law. Hence the writ issues to the jailer or custodian, directing him to produce the prisoner, not for inquiry into the legality of the detention, but simply to secure the presence of the accused in the court room while the trial proceeds. Such a writ is simply the proper process designed to secure the presence of one who is already serving a sentence.

Ex parte Bollman, 4 Cranch 75, 97.
Ex parte Lamar, 274 Fed. 160, 164, 169.
In re Blake, Appendix A.
Rigor *v.* State, 101 Md. 465.
Way *v.* Wright, 5 Met. (Mass.) 380.

The fact that Ponzi is in the custody of Blake as a Federal agent does not deprive the state court of power to *issue* this writ. A state court may *issue* the great constitutional writ of *habeas corpus ad subjiciendum* even though the prisoner be confined under Federal process. When the Federal officer makes return that he holds the prisoner under the authority of the United States, he establishes a good defense, and the state court can neither proceed to inquire into the legality of such detention nor relieve the prisoner therefrom.

Ableman *v.* Booth, 21 How. 506, 523.

If the state court has jurisdiction to issue the great constitutional writ designed to test the legality of the confinement, it is plain that it has jurisdiction to issue the procedural writ designed to bring a prisoner before it for trial. The only question which arises in such a case is whether any sufficient defense to the execution of the writ is disclosed *by the officer who holds the prisoner in custody*. That question has already been determined in the habeas corpus proceeding brought by Sheriff Blake.

In re Blake, Appendix.

E. *Ponzi cannot be Heard to Assert that the Present Writ is an Invasion of the Rights of the United States.*

Ponzi attempts to assert that to try him while he is still serving a sentence as the prisoner of the United States is an invasion of Federal sovereignty. That contention is not open to him. He is not the government of the United States. Even if the United States

could successfully oppose this writ, Ponzi has no authority to decide that question for the United States. The question is one of comity between the United States and the Commonwealth of Massachusetts. The decision whether to oppose the writ or to permit it to be executed is to be determined by the United States alone in the light of all the circumstances of the particular case. Ponzi can neither speak for the United States nor demand as of right an asylum in Plymouth jail.

In Ker *v.* Illinois, 119 U. S. 436, in holding that the right of Peru to refuse to surrender a fugitive from justice did not vest in the fugitive a right to demand asylum therein if Peru saw fit to surrender him, this court said, at p. 442:

"Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum."

In *In re* Andrews, 236 Fed. 300, the court, in holding that the United States might surrender to a state one held for deportation, without his consent, said, at p. 301:

"It is well settled that a state would have no right to take the relator out of the custody of the officers of the United States in these circumstances without the approval of the

United States. Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597. And it is equally well settled as a matter of comity between the federal and the state governments that either may surrender its custody of a prisoner to the other without the prisoner's consent. In such a case, the question of the jurisdiction and custody of the prisoner is one of comity between the governments, and not a personal right of the prisoner. United States *v.* Marrin (D. C.), 227 Fed. 314; *Ex parte* Marrin (D. C.), 164 Fed. 631."

In *Ex parte* Marrin, 164 Fed. 631, the District Court of New York declined to issue a writ of *habeas corpus* to release a prisoner in the custody of the state, charged with crime, because such prisoner was arrested while at large upon bail, awaiting the determination of a charge of crime pending before the Federal courts for the third Circuit, where neither the United States nor his principal upon the bail bond intervened to request such release. In holding that the prisoner could not assert on his own behalf any right of the United States, the court said, at page 637:

"If the presence of the defendant in Philadelphia were demanded by the United States, and if the ends of justice seemed so to require, it is believed that this court, in the exercise of its discretion, could enforce the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, and compel the return of the defendant for such further proceedings as might there be proper; but under the existing conditions of the case the exercise of this discretion is unnecessary, and the defendant or petitioner is not entitled to ask as a right what does not seem to be proper as a matter even of discretion.

Frank C. Marrin, therefore, does not seem to be held contrary to any law of the United States, nor in violation of any

of his constitutional rights, and the writ of habeas corpus must be dismissed, and the defendant returned to the warden of the city prison, in the Burrough of Brooklyn, to be held under the commitment of the County Court of King's county."

The above case was approved in United States *v.* Marrin, 227 Fed. 314, 318 (C. C. A. 3d).

Logan *v.* United States, 144 U. S. 263, does not aid Ponzi. All that that case decided was that a prisoner of the United States is entitled to protection from mob violence. A right to be protected from murder without trial is not a right not to be produced for trial before a duly constituted court having jurisdiction of the offense.

In the light of these authorities it is plain that Ponzi cannot be heard to assert in the name of the United States that to produce him for trial in the State court is any invasion of the right of the United States to hold him a prisoner during the term of his sentence. He is attempting to invoke a right which pertains not to him, but to the United States.

F. *No Right of the United States is in Fact infringed by the Production of Ponzi for Trial in a State Court.*

The relation between the states and the United States is not that of one foreign government to another. The United States of America is a single undivided nation. The governmental powers of that nation have been apportioned by the Federal Constitution between the states on the one hand and the Federal government upon the other. Neither the states nor the United States may usurp powers committed or

reserved to the other, or impede the other in the execution of those powers.

> McCulloch *v.* Maryland, 4 Wheat. 316.
> Dobbins *v.* Commissioners of Erie County, 16 Pet. 435.
> The Collector *v.* Day, 11 Wall. 113.
> Hammer *v.* Dagenhart, 247 U. S. 251.

But the relation between the two is one of comity and co-operation.

> Fort Leavenworth R.R. Co. *v.* Lowe, 114 U. S. 525, 541.
> Frank *v.* Mangum, 237 U. S. 309, 328.

The salutary doctrine of the separation of powers is not to be pressed to a dryly logical conclusion which would impede each in the exercise of the powers committed or reserved to it.

Execution of the writ directing Sheriff Blake to produce Ponzi for trial involves no invasion of the territorial sovereignty of the United States. The Plymouth House of Correction is a state institution situated within the Commonwealth. It has never been ceded to or purchased by the United States. Ponzi is confined therein by consent of the Commonwealth.

> G. L., c. 126, §§ 4, 8, formerly R. L., c. 224, §§ 4, 8.

There can be no question that a writ issued under G. L., c. 248, § 25, runs within the Plymouth House of Correction. Any contention that Ponzi is in a different

territorial jurisdiction is wholly without foundation. The objection, unsuccessfully raised by Lamar, to the transfer from Georgia to New York, has no support in the facts of this case.

See *Ex parte* Lamar, 274 Fed. 160.

The objection that production of Ponzi *for trial* is an interference with the execution of his federal sentence is untrue in fact. Production of a prisoner for trial in the custody of his jailer does not modify his sentence. A federal prisoner may be produced for trial before the federal court of another district. In *Ex parte* Lamar, 274 Fed. 160, 164, the court says:

"A writ of habeas corpus may be issued 'when it is necessary to remove a prisoner in order to prosecute or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the act was committed.' *Ex parte* Bollman, 8 U. S. (4 Cranch) 75, 2 L. Ed. 554. And a writ of habeas corpus ad prosequendum requiring the production of a prisoner for trial is a power granted by section 262 of the Judicial Code (Comp. St. § 1239). Section 1014 of the Revised Statutes (Comp. St. § 1674) provides how offenders against the United States may be arrested and removed for trial. It provides:

'And where an offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.'"

A state prisoner may be produced for trial before a state court.

In re Blake, D. C. Mass., April 27, 1921, Appendix A.

Rigor *v.* State, 101 Md. 465.
State *v.* Wilson, 38 Conn. 126.
Thomas *v.* People, 67 N. Y. 218 (Ct. of Appeals, Sickels, 22).
Peri *v.* People, 65 Ill. 17.
Commonwealth *v.* Ramunno, 219 Pa. 204.
Kennedy *v.* Howard, 74 Ind. 87.
People *v.* Majors, 65 Cal. 138.
Singleton *v.* State, 71 Miss. 782.
People *v.* Flynn, 7 Utah. 378.
Huffaker *v.* Commonwealth, 124 Ky. 115.
Clifford *v.* Dryden, 31 Wash. 545.
Ex parte Ryan, 10 Nev. 261.
Coleman *v.* State, 35 Tex. Cr. App. 404.
Brown *v.* State, 50 Tex. Cr. App. 114.
Simpson *v.* State, 56 Ark. 8.
State *v.* Keefe, 17 Wyo. 227, 252.
13 C.J. 1919, §§ 13, 14.
9 Cyc. 875, 876.
7 Am. & Eng. Encyc., 2d Ed. 497.

In *In re* Thaw, 166 Fed. 71, it was held that a state prisoner might be produced to testify before a federal court. And in *In re* Blake (Appendix), the District Court of Massachusetts held that Ponzi could be produced for trial before the Superior Court of Suffolk County. Temporary production in order that the prisoner may be tried or give testimony does not in any just sense conflict with the mittimus under which he is held.

In re Blake, Appendix.
State *v.* Wilson, 38 Conn. 126.
Way *v.* Wright, 5 Met. 380.

Storti's Case, 178 Mass. 549, 554.
Rigor *v.* State, 101 Md. 465.
R. S., § 753; U. S. Comp. Sts., 1916, § 1281.

In contemplation of law he is still serving his sentence in the penal institution to which he is committed.

We frankly concede that the state court cannot release a federal prisoner from federal custody upon a writ of *habeas corpus ad subjiciendum*.

Ableman *v.* Booth, 21 How. 506.
Tarble's Case, 13 Wall. 397.

It is a sufficient answer to this writ that the officer holds the prisoner under the authority of the United States. But the writ upon which Ponzi is produced before the Superior Court of Suffolk County is not of this character. It does not draw in question the legality of his detention. It expressly recognizes the superior right of the United States to hold Ponzi in confinement. (R., p. 2.) The distinction between the procedural writ which directs the production of a prisoner for trial or to give testimony, and the constitutional writ designed to test the legality of his detention in custody is clearly settled.

Ex parte Bollman, 4 Cranch 75, 97.
Ex parte Dorr, 3 How. 103, 104.
In re Thaw, 166 Fed. 71.
In re Blake, Appendix.
Ex parte Lamar, 274 Fed. 160, 164, 169.
Rigor *v.* State, 101 Md. 465.
Wilson *v.* State, 38 Conn. 126, 135.
3 Bl. Com. *129.

Nor does sentence present any difficulty; the court has power to sentence "from and after" the expiration of the federal sentence.

Kite *v.* Commonwealth, 11 Met. 581.
Ex parte Lamar, 174 Fed. 160.

The principle of Ableman *v.* Booth does not apply.

Public policy demands that neither the division of this country into states nor the apportionment of powers between the states and the United States shall afford an asylum to those charged with crime. The Constitution itself requires each state to surrender fugitives from justice to the state from which they fled.

U. S. Cons., art. IV, § 2.

Places ceded by a state to the United States are not permitted to be havens from state process.

Fort Leavenworth R.R. Co. *v.* Lowe, 114 U. S. 525.
Commonwealth *v.* Clary, 8 Mass. 72.
39 Cyc. 730.

Indeed, the United States, with the consent of a state, may commit federal prisoners to state penal institutions.

Randolph *v.* Donaldson, 9 Cranch 76.
Ex parte Wilson, 114 U. S. 417.
G. L., c. 126, §§ 4, 8; R. L., c. 224, §§ 4, 8.

Ponzi was so committed in the instant case. It would be a clear departure from the policy so established to hold that a federal prisoner committed to a state in-

stitution cannot be produced before the state court for trial in the custody of his jailer in the same manner as a state prisoner, even though the United States does not object to production for this temporary purpose.

No contrary inference can be drawn from R. S., § 753; U. S. Comp. Sts., 1916, § 1281, which provides, in part:

> "The writ of habeas corpus shall in no case extend to a prisoner in jail . . . unless it is necessary to bring the prisoner into court to testify."

That section is derived from the Judiciary Act of 1789 (1 Stat. 81, § 14). Congress may not have deemed it expedient at that time to require that a state prisoner should be produced in a federal court for trial, irrespective of consent or objection by the state and without any consideration whether such production would, under the circumstances of the particular case, interfere with trial by the state. It may well be that broader powers are now possessed under R. S., § 1214 (U. S. Comp. Sts., 1916, § 1674, and Jud. Code § 262; U. S. Comp. Sts., 1916, § 1239).

See *Ex parte* Lamar, 274 Fed. 160, 164.

But even if it be assumed that Congress has not conferred power on the Federal courts to order the production of a state prisoner for trial, that furnishes no reason why the broader state provision should be denied effect when in fact the production of the Federal prisoner in no way interferes with any right of the United States. Indeed, the provision for production in order to testify is a recognition that production for

a purpose which does not draw in question the legality of the confinement is not an invasion of the right to hold the prisoner in such confinement.

In re Thaw, 166 Fed. 71.
In re Blake, Appendix.

G. *The Superior Court of Suffolk County has Jurisdiction to try Ponzi when Produced in the Custody of Blake.*

The Superior Court of Suffolk County has jurisdiction of the subject matter, namely, the offenses with which Ponzi stands charged.

See B, *supra.*

Ponzi is before the court upon valid process issued by that court.

See E, *supra.*

He is *not* before the court upon order of the Attorney General of the United States. The United States has appeared by the Attorney General, who represents it in all litigation, and stated in open court that it has no objection to the issue of the writ or to compliance by Blake therewith. (R., p. 2.) Such assent is sufficient.

In re Blake, Appendix.

The question whether production upon order of the Attorney General without other process would confer jurisdiction does not arise, and the objection raised without avail by Lamar finds no support in the facts.

See *Ex parte* Lamar, 274 Fed. 160.

Even if Ponzi had been kidnapped and brought by force into Massachusetts, or had been illegally transferred from another state or country, so that the present process might be served upon his keeper, the Superior Court would not lack jurisdiction and Ponzi could not by a writ of habeas corpus successfully oppose trial.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
In re Johnson, 167 U. S. 120.
Pettibone *v.* Nichols, 203 U. S. 192.
Ex parte Lamar, 274 Fed. 160.

The objection that Ponzi is not in the custody of the Superior Court is wholly without merit. Custody is not an ingredient of due process of law. Even the Fifth and Sixth Amendments to the Federal Constitution, which are not a limitation upon the states and which impose upon the United States a stricter rule than "due process" requires (see Twining *v.* New Jersey, 211 U. S. 78; Maxwell *v.* Dow, 176 U. S. 581; Hurtado *v.* California, 110 U. S. 516), do not enumerate the right to be held in custody among the requirements of trial according to law. Nor is custody enumerated in the definition of "due process" given in Frank *v.* Mangum, 237 U. S. 309, 326:

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard,

before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. Walker *v.* Sauvinet, 92 U. S. 90, 93; Hurtado *v.* California, 110 U. S. 516, 535; Andrews *v.* Swartz, 156 U. S. 272, 276; Bergemann *v.* Backer, 157 U. S. 655, 659; Rogers *v.* Peck, 199 U. S. 425, 434; Drury *v.* Lewis, 200 U. S. 1, 7; Felts *v.* Murphy, 201 U. S. 123, 129; Howard *v.* Kentucky, 200 U. S. 164.'"

We may assume that one charged with a felony has a right to be personally present during those portions of the trial where an opportunity to be heard should be accorded.

Hopt *v.* Utah, 110 U. S. 574, 577.
Lewis *v.* United States, 146 U. S. 370.
G. L., c. 278, § 6; R. L., c. 219, § 6.

But even presence is not required at every stage of the proceedings.

Schwab *v.* Berggren, 143 U. S. 442, 446.
Commonwealth *v.* Cody, 165 Mass. 133, 138.
Commonwealth *v.* Costello, 121 Mass. 371.

And the right to be present at every moment of the trial may be waived.

Frank *v.* Mangum, 237 U. S. 309, 338.
Valdez *v.* United States, 244 U. S. 432, 445.
Dowdell *v.* United States, 221 U. S. 325.
Howard *v.* Kentucky, 200 U. S. 164, 172.

Custody is simply one means by which the presence of the accused is secured. One out on bail is not in any

sense in the custody of the court. He is at large in the custody of the bail.

Commonwealth *v.* Brickett, 8 Pick. 138.

In Graves' Case, 236 Mass. 493, 497, the court said:

"He (petitioner) was not in the custody of the court but at large in the custody of the bail."

Indeed, one out on bail is so nearly at liberty that *habeas corpus* will not lie to release him from a restraint so nominal.

Sibray *v.* United States, 185 Fed. 401.
In re O'Brien, 29 Mont. 530.
Ex parte Walker, 53 Miss. 366.
Ex parte Henion, 55 Pac. 326 (Cal.).

See also Wales *v.* Whitney, 114 U. S. 564, 571.

Yet one out on bail may be tried if personally present although in no sense in the custody of the court.

Diaz *v.* United States, 223 U. S. 442, 453.
Commonwealth *v.* McCarthy, 163 Mass. 458.

The means by which presence is secured are not to be confused with the right to be present. If the accused be present, it is immaterial by what means such presence is obtained.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
Pettibone *v.* Nichols, 203 U. S. 192.
Ex parte Lamar, 274 Fed. 160.

Indeed, no prisoner is in any just sense in the custody of the court. He is in the custody of an executive

officer whether he is simply under arrest or actually serving sentence. A penal institution is no part of the court nor are the officers thereof officers of the court. A prisoner serving sentence is produced in the custody of the warden or master or of his deputy. If custody *by the court* were an ingredient of jurisdiction, no prisoner serving sentence could be tried, which is manifestly not the case.

See C, *supra*.

The court obtains jurisdiction of the person of the prisoner when the officer produces him in obedience to process.

Ex parte Lamar, 274 Fed. 160.
In re Blake, Appendix.

That condition is fulfilled in the case of Ponzi.

The objection that the court lacks jurisdiction because Ponzi is produced in the custody of a federal agent is without substance. As Blake produces Ponzi for trial in obedience to the same process upon which Blake would produce a state prisoner for trial, the situation of Ponzi differs in no essential respect from that of any prisoner produced for trial in the custody of his jailer. So long as Blake obeys the process (as in the present case he must) and the United States does not object, Ponzi cannot make either a constitutional or jurisdictional point out of the color of his jailer's uniform. He is present in court in obedience to process and that suffices.

Mahon *v.* Justice, 127 U. S. 700.
Pettibone *v.* Nichols, 203 U. S. 192.

II. *The District Court, in the Exercise of a Sound Discretion, Properly Dismissed the Writ brought by Ponzi.*

The petition was rightly dismissed upon another ground as well. The question whether trial of Ponzi under the circumstances here disclosed constitutes due process cannot properly be determined until trial has been had and Ponzi has exhausted his remedy in the state courts and upon writ of error (if that will lie) to the Supreme Court of the United States. A question of jurisdiction, which can properly be reviewed upon appellate proceedings, should not be determined in advance upon *habeas corpus* unless the petitioner shows beyond all doubt that the jurisdiction to try does not exist.

In Frank *v.* Mangum, 237 U. S. 309, the court said, at p. 328:

"And the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts. Virginia *v.* Rives, 100 U. S. 313, 318; Civil Rights Cases, 109 U. S. 3, 11; McKane *v.* Durston, 153 U. S. 684, 687; Dreyer *v.* Illinois, 187 U. S. 71, 83-84; Reetz *v.* Michigan, 188 U. S. 505, 507; Carfer *v.* Caldwell, 200 U. S. 293, 297; Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 107; *In re* Frederich, Petitioner, 149 U. S. 70, 75; Whitten *v.* Tomlinson, 160 U. S. 231, 242; Baker *v.* Grice, 169 U. S. 284, 291; Minnesota *v.* Brundage, 180 U. S. 499, 503; Urquhart *v.* Brown, 205 U. S. 179, 182.

It is, indeed, settled by repeated decisions of this court that where it is made to appear to a court of the United States

that an applicant for *habeas corpus* is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the State not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error. *Ex parte* Royall, 117 U. S. 241, 251; *In re* Frederich, Petitioner, 149 U. S. 70, 77; Whitten *v.* Tomlinson, 160 U. S. 231, 242; Baker *v.* Grice, 169 U. S. 284, 291; Tinsley *v.* Anderson, 171 U. S. 101, 105; Markuso *v.* Boucher, 173 U. S. 184; Urquhart *v.* Brown, 205 U. S. 179. And see Henry *v.* Henkel, 235 U. S. 219, 228. Such cases as *In re* Loney, 134 U. S. 372, 376, and *In re* Neagle, 135 U. S. 1, are recognized as exceptional.

It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte* Royall, 117 U. S. 241, 252 — applying in a *habeas corpus* case what was said in Covell *v.* Heyman, 111 U. S. 176, 182, a case of conflict of jurisdiction: — 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts

and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity.' And see *In re* Tyler, Petitioner, 149 U. S. 164, 186."

The rule applies with peculiar force to the case where the petitioner is already serving a sentence which in all probability will more than outlast the trial and any appellate proceedings resulting therefrom, and so can suffer no deprivation of liberty by reason of them. Even if there had been (as there is not) any real question as to the jurisdiction of the Superior Court, the court below rightly dismissed the petition in the exercise of a sound discretion.

Ex parte Royall, 117 U. S. 241.

CONCLUSION.

Public policy requires speedy trial for crime. Delay may cause a failure of justice. Witnesses may die or disappear and evidence may be lost. If the accused be innocent, he should be speedily vindicated. If he be guilty, swift and certain conviction is a salutary example which tends to deter others from committing crime. Delay aids the guilty, injures the innocent and brings the law into disrepute.

Guilt confers no special privilege. Conviction and sentence are no bar to trial for other offenses. A prisoner may be produced for trial in the custody of his jailer upon appropriate process directed to the jailer. There is no sensible distinction between one held under arrest without bail and a prisoner who is serving a sentence upon a conviction previously had. Production upon a writ of *habeas corpus ad prosequendum* is

as effectual to confer jurisdiction of the person as arrest upon a warrant or appearance under the compulsion of the bail. In either case due process is satisfied if the accused be present in court and receive trial according to law. A different rule would place the convicted criminal in a favored class simply because he has been found guilty and sentenced. Guilty persons are confined in prison for the protection of society, not in order to protect them from prosecution for other offenses.

A federal prisoner has no special constitutional privilege. The constitutional principle that the state shall not impede the United States in the execution of its constitutional powers is not a privilege or immunity of the citizen. Sentence for violation of the laws of the United States does not entitle a federal prisoner to invoke it. He has no right to determine whether his jailer shall obey a writ of *habeas corpus ad prosequendum* issued by a state court. That question is to be determined by the United States in the light of all the circumstances of the particular case. If the United States, acting through its chief law officer, who represents it in all litigation, appears in open court and waives objection to the execution of the writ, that federal question is eliminated. The prisoner being before the court upon process issued by the court cannot prevent trial by invoking the constitutional writ of *habeas corpus ad subjiciendum*.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
In re Johnson, 167 U. S. 120.
Pettibone *v.* Nichols, 203 U. S. 192.

The salutary power to punish crime, which is possessed by both the United States and the several states, should not be impeded by a narrow view of the relations between the two. The relation is one of comity. Conflict is to be avoided. Neither a state prison nor a federal prison nor the custody of a state officer, acting as a federal agent, should be an asylum for fugitives from justice. It is manifest that production of a federal prisoner before the state court in the custody of his jailer for the temporary purpose of ascertaining his guilt or innocence of other offenses in no way interferes with the right of the United States to hold such prisoner for the term of his sentence where any state sentence which may be imposed must be limited to take effect from and after the expiration of the federal sentence. A different view would offer a direct inducement to commit crime against the United States in order to secure asylum in federal custody. It would defeat one of the chief ends of government, namely, the protection of the citizen from criminal wrong.

The question certified should be answered in the ~~negative~~ affirmative.

Respectfully submitted,

J. WESTON ALLEN,
Attorney General for the
Commonwealth of Massachusetts.

EDWIN H. ABBOT, JR.,
Assistant Attorney General.

APPENDIX A.

DISTRICT COURT OF THE UNITED STATES.

No. 1985 Civil. DISTRICT OF MASSACHUSETTS.

In re EARL P. BLAKE,

PETITIONER FOR HABEAS CORPUS.

OPINION.

(27 APRIL, 1921.)

MORTON, J. This is a petition for habeas corpus to secure the discharge of the petitioner, who stands committed for contempt by the State Court. The facts are not in dispute and are as stated in the petition and in the answer. They may be briefly summarized as follows:

Mr. Blake is the keeper of the House of Correction at Plymouth, Mass. On 30 November, 1920, one Charles Ponzi was sentenced by this Court to imprisonment there for a term of five years. The mittimus duly issued and Ponzi is now held by Mr. Blake under said sentence. Ponzi has been indicted in the State Court and the Commonwealth desires to try him at once on said indictment. It applied for and obtained from the State Court a writ of habeas corpus ad testificandum, ad prosequendum, etc., the object of which was to secure the presence of Ponzi in order that he might be tried and, if convicted, sentenced. The

writ directed the petitioner to produce Ponzi in the State Court for the purpose stated, and was so phrased as to show clearly that the validity and priority of the Federal sentence was clearly recognized, that no interference with Federal custody was intended, and that nothing inconsistent with the sentence would be attempted by the State Court. The Attorney General of the United States appeared by one of his Assistants in the State Court and assented to the issuance of the writ; he has also directed Mr. Blake to produce Ponzi in accordance with it.

Mr. Blake was advised by counsel that the State Court had no authority over a Federal prisoner, and that even with the assent of the United States Attorney General it would not be legal or proper for him to produce Ponzi in the State Court. He therefore respectfully declined to do so, following the practice laid down in Robb *v.* Connolly, 111 U. S. 624, by which, as he was advised, the proceeding was governed. The State Court adjudged him in contempt for his refusal to obey the writ and produce Ponzi as directed, and made an order committing him to custody. Thereupon the present petition was brought.

So far as Ponzi himself is concerned, none of his constitutional rights are being violated by the proceedings against him in the State Court. He has no right to make his Federal sentence an asylum from prosecution there.

Nor is he being relaxed to another jurisdiction for trial upon an administrative or executive order. The State Court, upon proceedings duly had, has issued its writ requiring Mr. Blake to produce Ponzi before it for trial, and after full hearing has held that its writ must be obeyed.

The only party having standing to question that decision is the United States, upon the ground that its exclusive jurisdiction and control over Ponzi as its prisoner is thereby interfered with. The United States, however, makes no such objection. On the contrary, as before stated, its Attorney General appeared by his Assistant in the State Court and there assented on its behalf to the issue of the writ.

The position of the petitioner therefore comes to this, that the action of the State Court constitutes such a fundamental violation of Federal jurisdiction as to be invalid, and that it is his duty to disregard it, even though done with the assent of the Attorney General.

Of the exclusive jurisdiction of the United States over Ponzi there can be — and is — no question. (Robb *v.* Connolly, *supra.*) The sentence imposed on him here must be carried out unless modified by Executive action, and cannot be interfered with in any other way. It is not essential, however, that the mittimus shall be literally obeyed. In matters which do not substantially increase the hardship of the sentence, there is considerable latitude of action. For instance, the Attorney General may, within certain limitations, transfer prisoners under sentence from one prison to another; and it is customary for the Federal authorities to honor writs of habeas corpus ad testificandum issued by State Courts desiring the testimony of Federal prisoners; and conversely for this Court to issue similar writs for prisoners under State sentence. So far as I am aware, no question has ever been raised as to the legality of such action.

Doubtless, such writs do, strictly speaking, interfere

somewhat with the execution of the sentence and infringe — technically — on the other jurisdiction. The reason for the practice probably is that it is more convenient for the Court where the testimony of the prisoner is needed to issue the writ; and no harm is done.

Writs ad testificandum are essentially different from the real — or so-called "prerogative" — writ of habeas corpus. They recognize the validity of the imprisonment, while the "prerogative" writ questions it and puts it on trial. Robb *v.* Connolly, *supra*, which is relied on by the petitioner was a "prerogative" writ, and that decision is distinguishable from the present case. Of course, the United States could not submit to have the legality of sentences imposed in its Courts tried in another jurisdiction; nor could the States, except as to questions arising under the Constitution or laws of the United States.

The writ issued by the State Court for Ponzi explicitly recognizes the Federal custody and jurisdiction of him and does not undertake to interfere with either. It does not bring in question the legality of his sentence, and will interfere with it no more than a habeas corpus ad testificandum might do. Whether against objection made on behalf of the United States the State Court could have issued it, it is not necessary to decide. When rights or interests of the United States must be considered in litigation between third parties, the Attorney General has the power within wide limits to speak for the United States. In assenting to the issue of the writ by the State Court, he acted within his powers.

I think it clear that the action of the State Court was not such an obvious, unwarranted, and fundamental interference with the jurisdiction of the United States as would justify this Court in holding that the petitioner ought to disregard it. On the contrary, it is, in my opinion, his duty to obey, provided, of course, that all expenses occasioned by the writ are paid by the State, and adequate precautions, satisfactory to Mr. Blake, are taken by it to secure and protect the prisoner, while being transported and attending under the writ.

It follows that the petition must be dismissed.

I may add that, in view of the novelty and importance of the question, I think that Mr. Blake was quite justified in submitting the matter to the Court under whose mittimus he held the prisoner, before producing him elsewhere, and in taking such steps as were necessary properly to raise the question.

ENDORSED.

No. 1985 Civil.

In re EARL P. BLAKE.

PETITIONER FOR HABEAS CORPUS.

OPINION.

United States District Court,

Mass. Dist.

Filed in Clerk's Office,

Apr. 27, 1921.

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

I, ARTHUR M. BROWN, Deputy Clerk of the District Court of the United States for the District of Massachusetts, and during the temporary absence of the Clerk, in charge of the affairs of the Clerk's office of said Court and the custodian of its files and records, do hereby certify that the foregoing is a true copy of the OPINION handed down April 27, 1921, in the cause entitled *In re* EARL P. BLAKE, Petitioner for Habeas Corpus, and numbered 1985 on the Civil Docket of said Court.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this twenty-eighth day of April, A.D. 1921.

ARTHUR M. BROWN,
Deputy Clerk.

(Seal)

No. 661.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

OSCAR POPE

v.

FRANCIS G. FRANCIS ET AL.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES PONZI
v.
FRANKLIN G. FESSENDEN ET AL. } No. 631.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.

The Solicitor General, on behalf of the United States, moves the Court to permit the Government to file this brief as *amicus curiæ* in the above-entitled case.

On September 11, 1920, twenty-two indictments were returned against Ponzi in the Superior Court for Suffolk County, Mass., charging him with certain larcenies, with being an accessory before the fact to certain larcenies, and with conspiracy to commit larceny.

On November 30, 1920, Ponzi pleaded guilty in the District Court of the United States for the District of Massachusetts to the first count of an indictment charging violation of section 215, Penal Code, namely, for using the mails in connection with a scheme to defraud. He was sentenced by said court to im-

prisonment for five years in the House of Correction at Plymouth, Mass.

On April 21, 1921, the said Superior Court for Suffolk County issued a writ directing Blake, the master of said House of Correction, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the aforesaid twenty-two indictments, but to hold Ponzi at all times in his (Blake's) custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake made return to said writ that he held Ponzi pursuant to process of the United States and prayed that said writ might be dismissed.

By direction of the Attorney General of the United States, an Assistant Attorney General stated in open court that the United States had no objection to the issue of the writ, or to compliance therewith by Blake, or to the production of Ponzi for trial in the Superior Court.

Blake refused to produce Ponzi in the Superior Court, which adjudged him in contempt, and committed him to custody. He thereupon filed a petition in the United States District Court for a writ of habeas corpus, which was dismissed by that court on April 27, 1921. Blake did not appeal, but thereafter produced Ponzi in the said Superior Court pursuant to the writ issued by said court.

On May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus alleging in substance that the said Superior Court had no jurisdiction to try him when produced by Blake for trial

upon the writ above described. Ponzi's petition was denied by said District Court on May 24, 1921; he appealed to the Circuit Court of Appeals, and that court has certified to this Court the following question:

> May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

Ponzi makes two contentions which directly affect the United States:

(1) That to try him in the State court for offenses against the State while he is confined upon a Federal sentence invades the rights of the United States.

(2) That the Attorney General has no authority to appear in open court and state that the United States does not object to production of Ponzi for trial in the manner above set forth.

The purpose of this brief is to state the position of the United States in respect of these contentions.

I.

Ponzi is the prisoner of the United States. He has no authority to speak for the United States. Any right of the United States must be asserted by one

who is authorized by law to speak for the United States.

II.

The Attorney General is the proper officer to assert on behalf of the United States any right or interest of the United States. Revised Statutes, sec. 367, provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

III.

The United States does not perceive that any right of the United States is violated by production of Ponzi before the State court for trial in the custody of the Federal agent who holds him pursuant to the mittimus of the United States District Court. The State court does not question the right of the United States to hold Ponzi for the term of his sentence. The writ issued by that court expressly recognizes the superior right of the United States to the custody of Ponzi. Any sentence which that court can impose can not take effect until the expiration of the Federal sentence. It is a common practice to permit the production of Federal prisoners to testify before State courts and to cause State prisoners to appear before Federal courts to testify. This practice has not been

deemed to interfere with the right to hold the prisoner in custody pursuant to his sentence or to infringe upon the execution of the mittimus under which he is held. It is not perceived wherein the production of a prisoner before a court in order that his guilt or innocence of another offense may be determined upon testimony given by himself or others interferes to any greater extent with the right to hold him in custody or with the execution of the mittimus. This was the view expressed by the United States District Court when it dismissed Blake's petition for a writ of habeas corpus. (See *In re Blake*, printed as "Appendix A" in the brief for Franklin G. Fessenden.)

In thus stating the position of the Federal Government, the Solicitor General takes no position and expresses no opinion as to whether under the laws of Massachusetts the said Ponzi can or should be put on trial for an offense against the laws of that State while a prisoner of the United States. This the Solicitor General regards as a question for the courts of Massachusetts to determine. The United States takes the position above outlined in the spirit of comity, which should mark the Nation and the States in the administration of justice, especially in the enforcement of the laws with respect to crimes.

JAMES M. BECK,
Solicitor General.

W. MARVIN SMITH,
Assistant Attorney.

MARCH, 1922.

○

PONZI *v.* FESSENDEN ET AL.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 631. Argued March 8, 9, 1922.—Decided March 27, 1922.

1. Our system of state and federal jurisdiction requires a spirit of reciprocal comity between courts to promote due and orderly procedure. P. 259.
2. The fact that a man is serving a sentence of imprisonment imposed by a federal court for a federal offense, does not render him immune to prosecution in a state court for offenses committed against the State. P. 264.
3. A federal prisoner may, with the consent of the United States, be brought before a state court, for trial on indictment there, by a writ of *habeas corpus* issued by that court and directed to the warden having him in charge as federal agent, then to be returned and serve out the federal sentence. P. 261.

4. The Attorney General, in view of his statutory functions, has implied power to exercise the comity of the United States in such cases, provided enforcement of the sentence of the federal court be not prevented or the prisoner endangered. P. 262.
5. Upon trial and conviction of one already sentenced for another crime, execution of the second sentence may begin when the first terminates. P. 265.

THIS case comes here for answer to the following question of law:

"May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a state court, in the custody of said master and there put to trial upon indictments there pending against him?"

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court for Suffolk County, Massachusetts, charging him with certain larcenies.

October 1, 1920, two indictments charging violation of § 215 of the Federal Penal Code were returned against him in the United States District Court for the District of Massachusetts. November 30, 1920, he pleaded guilty to the first count of one of these, and was sentenced to imprisonment for five years in the House of Correction at Plymouth, Massachusetts, and committed.

April 21, 1921, the Superior Court issued a writ of habeas corpus directing the master of the House of Correction, who, as federal agent, had custody of Ponzi by virtue of the mittimus issued by the District Court, to bring him before the Superior Court and to have him there from day to day thereafter for trial upon the pending indictments, but to hold the prisoner at all times in his custody as an agent of the United States subject to the sentence imposed by the Federal District Court. Blake,

the master of the House of Correction, made a return that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

Thereafter the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the Superior Court and that the Attorney General had directed Blake to comply with the writ. Blake then produced the prisoner, who was arraigned on the state indictments and stood mute. A plea of not guilty was entered for him by the court.

May 23, 1921, Ponzi filed in the District Court a petition for a writ of habeas corpus directed against the Justice of the Superior Court, and against Blake, alleging in substance that he was within the exclusive control of the United States, and that the state court had no jurisdiction to try him while thus in federal custody. His petition for writ of habeas corpus was denied. An appeal was taken to the Circuit Court of Appeals, the judges of which certify the question to this court on the foregoing facts. § 239, Judicial Code.

Mr. William H. Lewis for Ponzi.

If the petitioner could not be tried in the state court, pending his sentence, without the consent of the Attorney General of the United States, he could not be tried at all.

The Attorney General of the United States is a statutory officer, and has no authority over prisoners of the United States except such as is expressly given him by some statute of the United States, or as may be necessarily implied from some express statute.

He has no control over a prisoner in a state jail or penitentiary. Rev. Stats., § 5539.

254. Argument for Ponzi.

A federal prisoner is entitled to protection. *Beavers* v. *Henkel,* 194 U. S. 83; *Logan* v. *United States,* 144 U. S. 295.

The Attorney General has neither express nor implied authority to intervene in a *habeas corpus* case of this character.

If the situation were reversed, and Ponzi had been first tried in the state court and sentenced to serve a term in a state jail or prison, and the United States desired to try him upon indictments pending against him in the United States District Court, neither the court, nor any judge thereof, could issue a writ of *habeas corpus* to bring him into that court for trial. Rev. Stats., § 753; *Ex parte Burrus,* 136 U. S. 586; *Re Dorr,* 3 How. 103; *Ex parte Bollman,* 4 Cranch, 75.

It would seem, therefore, that the United States ought not to permit a state court to try a prisoner of the United States where, under the same circumstances, a United States court could not try a state prisoner. There is no comity in it.

In all the judicial history of the Commonwealth, from *Sims's Case,* (1851) 61 Mass. 285, down to the present, Massachusetts has never attempted to assert the right which is now being asserted in this case.

The proceeding of the state court is practically forbidden by the laws of the Commonwealth upon the subject of *habeas corpus.* Gen. Laws, c. 248, § 34.

This writ was used in the English law to bring in prisoners from one court to another in the same jurisdiction. That was the use of the writ in the *Bollman Case, supra.* It is used here as a substitute for removal, or an extradition proceeding. Obviously, this writ could not be used to take a prisoner from one State to another, from one jurisdiction to another jurisdiction. The jurisdiction of the United States, where Ponzi is, is just as foreign to Massachusetts as Rhode Island is to Georgia, and the writ

of the Massachusetts court can not cross the line between the two jurisdictions.

The mittimus itself forbids interference with the body of Ponzi by the state court. It is fundamental that, after the term of the court has expired at which sentence was rendered, the court itself cannot interfere with its own mittimus. *In re Jennings*, 118 Fed. 479; *Commonwealth* v. *Foster*, 122 Mass. 317; *Goddard* v. *Ordway*, 101 U. S. 752; *Basset* v. *United States*, 9 Wall. 38; *Ex parte Lange*, 18 Wall. 167.

In all cases of concurrent jurisdiction or otherwise, the court that first acquires jurisdiction holds it to the exclusion of all others, until its judgment is satisfied. *McCauley* v. *McCauley*, 202 Fed. 280, 284; *State* v. *Chinault*, 55 Kans. 326; *Ex parte Earley*, 3 Oh. Dec. 105; *Commonwealth* v. *Fuller*, 8 Metc. 318; *Hill Mfg. Co.* v. *Providence & New York S. S. Co.*, 113 Mass. 495; *Ayers* v. *Farwell*, 196 Mass. 350; *Wayman* v. *Southard*, 10 Wheat. 1; *Covell* v. *Heyman*, 111 U. S. 176; *Taylor* v. *Taintor*, 16 Wall. 366; *Felts* v. *Murphy*, 201 U. S. 123; *Harkrader* v. *Wadley*, 172 U. S. 163; *In re Johnson*, 167 U. S. 120; *Opinion of the Justices*, 201 Mass. 609.

Can the state court try Ponzi without jurisdiction over his person; in other words, without custody of the prisoner? Ponzi, as a prisoner of the United States, is "within the dominion and exclusive jurisdiction" of the United States. *Ableman* v. *Booth*, 21 How. 506. See also *Robb* v. *Connoly*, 111 U. S. 624; *In re Johnson*, 167 U. S. 120; *Logan* v. *United States*, 144 U. S. 263; Willoughby, Const., c. 9, § 72; Bailey, Habeas Corpus, p. 68; 6 Ops. Atty. Gen. 103; 12 *id.* 258.

Upon the principles of natural justice, the state court should not be permitted to try Ponzi under the circumstances, because he would be subject to double punishment for the same acts.

Is it the "due process of law" to which the petitioner is entitled under § 1 of the Fourteenth Amendment to

be set to trial in a state court while serving sentence as a federal prisoner? *Twining* v. *New Jersey*, 211 U. S. 103; *Frank* v. *Mangum*, 237 U. S. 348; *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8.

The contention is that the court, being without custody of Ponzi's body, cannot try him in a criminal case. Const. Mass. Art. XXVI; Gen. Laws Mass., c. 276, § 42.

The principle contended for by the respondents is a dangerous one, in that it will lead to confusion, frequent clashes, and conflicts of jurisdiction, where now none exists.

Mr. J. Weston Allen, Attorney General of the State of Massachusetts, with whom *Mr. Edwin H. Abbot, Jr.*, was on the brief, for Fessenden et al.

Mr. Solicitor General Beck and *Mr. W. Marvin Smith*, by leave of court, filed a brief on behalf of the United States, as *amici curiae*.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the court.

We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. *In re Andrews,* 236 Fed. 300; *United States* v. *Marrin,* 227 Fed. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

One accused of crime, of course, can not be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense. *Frank* v. *Mangum,* 237 U. S. 309, 341; *Lewis* v. *United States,* 146 U. S. 370. If that is accorded him, he can not complain. The fact that he may have committed two crimes gives him no immunity from prosecution of either.

The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in *Covell* v. *Heyman,* 111 U. S. 176, as follows:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility

which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

The *Heyman Case* concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in *Ableman* v. *Booth*, 21 How. 506, quoted from, and relied upon, in *Covell* v. *Heyman*.

In the case at bar, the Federal District Court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment and was detained under United States authority to suffer the punishment imposed. Until the end of his term and his discharge, no state court could assume control of his body without the consent of the United States. Under statutes permitting it, he might have been taken under the writ of habeas corpus to give evidence in a federal court, or to be tried there if in the same district, § 753, Rev. Stats., or be removed by order of a federal court to be tried in another district, § 1014, Rev. Stats., without violating the order of commitment made by the sentencing court. *Ex parte Bollman*, 4 Cranch, 75, 98; *Ex parte Lamar*, 274 Fed. 160, 164. This is with the authority of the same sovereign which committed him.

There is no express authority authorizing the transfer of a federal prisoner to a state court for such purposes.

Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the federal and state courts is vested. The Attorney General is the head of the Department of Justice. Rev. Stats., § 346. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *In re Neagle*, 135 U. S. 1; *Kern River Co.* v. *United States*, 257 U. S. 147; Rev. Stats., § 359; Act of June 30, 1906, c. 3935, 34 Stat. 816; Rev. Stats., §§ 360, 361, 357, 364. By § 367, Rev. Stats., the Attorney General is authorized to send the Solicitor General or any officer of the Department of Justice "to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

The prisons of the United States and the custody of prisoners under sentence are generally under the supervision and regulation of the Attorney General. Act March 3, 1891, c. 529, 26 Stat. 839. He is to approve the expenses of the transportation of United States prisoners by the marshals under his supervision to the wardens of the prisons where they are to be confined, 26 Stat. 839. He makes contracts with managers of state prisons for the custody of United States prisoners. Rev. Stats., § 5548. He designates such prisons. Rev. Stats., § 5546, amended 19 Stat. 88, and 31 Stat. 1450. Release of United States prisoners on parole whether confined in federal prisons or in state prisons is not made save with the approval of the Attorney General. Act of June 25, 1910, c. 387, 36 Stat. 819. The Attorney General is authorized to change the place of imprisonment of United

States prisoners confined in a state prison when he thinks it not sufficient to secure their custody, or on their application, because of unhealthy surroundings or improper treatment. Rev. Stats., § 5546, as amended 19 Stat. 88, and 31 Stat. 1450. One important duty the Attorney General has to perform is the examination of all applications for pardon or commutation, and a report and recommendation to the President.

This recital of the duties of the Attorney General leaves no doubt that one of the interests of the United States which he has authority and discretion to attend to, through one of his subordinates, in a state court, under § 367, Rev. Stats., is that which relates to the safety and custody of United States prisoners in confinement under sentence of federal courts. In such matters he represents the United States and may on its part practice the comity which the harmonious and effective operation of both systems of courts requires, provided it does not prevent enforcement of the sentence of the federal courts or endanger the prisoner. *Logan* v. *United States*, 144 U. S. 263.

Counsel for appellant relies on § 5539, Rev. Stats., which directs that when any criminal sentenced by a federal court is imprisoned in the jail or penitentiary of any State or Territory "such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory." This section it is said prevents the Attorney General or any other federal officer from ordering the superintendent of a state prison to produce a federal prisoner for trial or testimony. But it is clear that the section has no such effect. The section is only one of many showing the spirit of comity between

the state and national governments in reference to the enforcement of the laws of each. To save expense and travel, the Federal Government has found it convenient with the consent of the respective States to use state prisons in which to confine many of its prisoners, and the Attorney General is the agent of the Government to make the necessary contracts to carry this out. In order to render the duty thus assumed by the state governments as free from complication as possible, the actual authority over, and the discipline of, the federal prisoners while in the state prison are put in the state prison authorities. If the treatment or discipline is not satisfactory, the Attorney General can transfer them to another prison, but while they are there, they must be as amenable to the rules of the prison as are the state prisoners. But this does not have application to the procedure or the authority by which their custody may be permanently ended or temporarily suspended.

The authorities, except when special statutes make an exception, are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. One of the best considered judgments on the subject is *Rigor* v. *State*, 101 Md. 465. The Supreme Court of Maryland said (p. 471):

"The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."

Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offence is to postpone trial on many others, it furnishes the criminal an opportunity to avoid the full expiation of his crimes. These

considerations have led most courts to take the same view as that expressed in the case just cited. Other cases are *State* v. *Wilson*, 38 Conn. 126; *Thomas* v. *People*, 67 N. Y. 218, 225; *Peri* v. *People*, 65 Ill. 17; *Commonwealth* v. *Ramunno*, 219 Pa. St. 204; *Kennedy* v. *Howard*, 74 Ind. 87; *Singleton* v. *State*, 71 Miss. 782; *Huffaker* v. *Commonwealth*, 124 Ky. 115; *Clifford* v. *Dryden*, 31 Wash. 545; *People* v. *Flynn*, 7 Utah, 378; *Ex parte Ryan*, 10 Nev. 261; *State* v. *Keefe*, 17 Wyo. 227, 252; *Re Wetton*, 1 Crompt. & J. 459; *Regina* v. *Day*, 3 F. & F. 526.

It is objected that many of these cases relate to crimes committed in prison during service of a sentence. The Maryland case did not, nor did some of the others. But the difference suggested is not one in principle. If incarceration is a reason for not trying a prisoner, it applies whenever and wherever the crime is committed. The unsoundness of the view is merely more apparent when a prisoner murders his warden, than when he is brought before the court for a crime committed before his imprisonment. It is the *reductio ad absurdum* of the plea.

Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. *Kite* v. *Commonwealth*, 11 Metc. 581, 585, an opinion by Chief Justice Shaw; *Ex parte Ryan*, 10 Nev. 261, 264; *Thomas* v. *People*, 67 N. Y. 218, 226.

But it is argued that when the prisoner is produced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the state court can not try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. *State* v.

Wilson, 38 Conn. 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.

The question must be answered in the affirmative.